TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 194.

LEHIGH VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES H. BARLOW.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JULY 13, 1916.

(24,943)

(24,843)

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* * * * * * *

a–4 *Complaint.*

Title of Action.

The plaintiff herein for a Complaint against the defendant above named, alleges as follows:

I.

That on information and belief, at all the times hereinafter mentioned, the defendant was and still is a foreign corporation duly created, organized and incorporated under and by virtue of the laws of the state of Pennsylvania, as a railroad corporation, doing business and operating railway lines pursuant to law within the states of New York and Pennsylvania, and elsewhere, and engaged in interstate commerce.

5 II.

That on information and belief, at all times hereinafter mentioned, the defendant was and now is engaged in running and operating trains, locomotives and cars upon tracks owned or leased by the defendant in and about the City of Cortland, Cortland County, New York, and that at such times it had and used in connection with its tracks and trains as aforesaid, a round house, switches, sidings, coal trestle and other apparatus and appliances used in coaling its said engines and operating its said trains, and conducting its said business as a common carrier engaging in commerce between the states of New York and Pennsylvania and elsewhere; and that in operating its tracks, switches, sidings, coal trestle and round house, and in conducting its said business, it employed a large number of employees.

III.

That on or about the 27th day of July, 1912, the plaintiff was and had been for some time prior thereto, an employee and servant of the defendant, working as an engineer and otherwise upon an engine used in the yards of the defendant at the City of Cortland, New York, for the purpose of switching and placing coal cars and other cars, and conveying said cars to their destination in said yards, and that plaintiff was directed in his work by said defendant, its officers, agents, superintendents and foremen, in working in said yard; and that on said 27th day of July, 1912, at about 4:30 o'clock in the afternoon, and in pursuance of his duty, instructions and employment, plaintiff was working upon said engine which had been run upon a coal trestle situate just west and north of the round house of the defendant in said city for the purpose of placing certain loaded cars of coal upon said trestle, and coal pockets.

6 IV.

That it was the duty of the defendant, its officers, agents and servants, to give notice to plaintiff of all hazards and dangers, that he might incur by reason of being engaged in his duties working on said engine, as aforesaid, so that plaintiff might have opportunity to take the necessary precautions as to his safety and not be exposed to any unnecessary hazards and dangers and to promulgate and enforce proper rules and to have such coal trestle of proper construction, to have and keep said engine inspected and in suitable repair; and to give plaintiff reasonable warning of the movements of said engine and to not move said engine in a negligent and improper manner or at such times as to expose the plaintiff to danger.

V.

That the defendant, its officers, agents, servants and employees, neglected and failed to discharge its and their duties as aforesaid, in that at the time and place aforesaid while the plaintiff was working upon said engine upon said coal trestle by direction of your officers and agents, and in pursuance of his employment for the purpose of placing certain loaded coal cars thereon as directed by your officers and agents, and pursuant to his employment, the brake hanger coupling on said engine became displaced and out of repair, and plaintiff in pursuance of his employment and duty was attempting to repair and fix the same so that said engine could be run down off the said trestle and embankment, when said engine, without warning, and contrary to defendant's rules, was started rapidly down said trestle from a standing position, by the servant of defendant whose duty it was at that time to control and operate said engine, and said engine thereby ran over plaintiff, severing his right leg and throwing plaintiff to the ground, a distance of about ten feet,
7 breaking plaintiff's right collar bone and injuring and bruising plaintiff.

VI.

That on information and belief the said injuries to plaintiff were caused solely by the negligence, carelessness, omission of duty and the wrongful acts of the defendant, its officers, servants, agents and employees, by the failure of the said defendant to make, issue, promulgate or enforce among its servants, suitable and sufficient rules for the proper conduct of its business, so as to protect its servants, and so as to not expose plaintiff and its servants to unnecessary hazards and dangers in reference to operating engines and cars upon its coal trestle, and in reference to the using of said embankment and trestle, and the manner of placing cars and engines thereon, and by the failure of said defendant to furnish plaintiff in performing his work, as he was required to do, with competent men to control and operate said engine, and by the negligence of its servant having the authority of superintendence, control and command over said engine, in negligently signalling the same to start,

when plaintiff was in a position of imminent danger, and by the negligence of its servant having physical control and direction of the movement of said locomotive and engine in starting the same without ringing the bell or giving any signal or notice of his intention so to do, in violation of defendant's rules and in negligently starting said engine in violation of the instructions and directions given him; and in negligently failing to ascertain and understand the directions given to him; and by the failure of defendant to furnish plaintiff with a safe and suitable engine; and negligently furnishing plaintiff and the other servants of defendant with an angine which was broken and out of repair, and in failing to keep said engine in proper repair.

8 And that said injuries were caused solely by the negligence, carelessness and non performance of legal duty on the part of the defendant, its officers, agents and servants as aforesaid, and that no negligence, carelessness, want of care or omission on the part of the plaintiff caused or in any way contributed to said accident and injury.

VII.

That at all the times, and in all the said operations of said engine and cars, mentioned in this Complaint, the defendant was a common carrier by railroad engaged in commerce between the states of the United States, to-wit, between the states of New York and Pennsylvania and other states; and that plaintiff at all the times, and in all the said operations of said engine and cars, mentioned in the Complaint, was employed by the defendant in such interstate commerce within the terms of an act of Congress entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," being an act of the United States Congress known as the "Employers' Liability Act," which said act confers jurisdiction upon the courts of the state of New York to enforce the liability of common carriers to their employees in all cases coming within said act under which this action is brought; and plaintiff further alleges that the injuries sustained by him, as above set forth, resulted in whole or in part from the negligence of the officers, agents and employees of the defendant and by reason of the defects and insufficiency due to its negligence in the said engine, locomotive, trestle and equipment as above set forth, and that this action has been brought within two yars after the occurrence of said accident and injury as above set forth.

VIII.

9 That by reason of the facts and circumstances aforesaid, and solely owing to the negligence, carelessness and omissions of duty of the defendant, as aforesaid, and without any negligence or fault upon the part of the plaintiff causing said injuries or contributing thereto, the plaintiff was run over by said engine upon said trestle, severing his right leg below the knee, and was thrown and fell through said trestle heavily and violently upon the ground, a distance of about ten feet thereunder, and received in

addition to the severing of his said leg a fracture of the right collar bone and a rupture and straining of the muscles and nerves and other tissues in the vicinity of the right leg and the right shoulder, and received other injuries, bruises and contusions to and on his body, arms, head and limbs, causing a great shock to his entire nervous system, from which injuries he became and continues to be sick, sore, maimed, disordered and deformed, and he is permanently crippled and deformed in said shoulder and leg, and he has ever since suffered and still suffers and will in the future suffer great pain and distress. That he has been and will permanently be wholly incapacitated and prevented from carrying on his usual occupation which is that of a locomotive engineer in the usual manner, and that he has necessarily expended a large sum of money in endeavoring to be cured of his injuries, and will hereafter necessarily expend a large sum of money for further necessary medical treatment and nursing, all to the plaintiff's damage of Twenty-five Thousand Dollars.

Wherefore, plaintiff demands judgment against the defendant in the sum of Twenty-five Thousand Dollars, together with the costs and disbursements of this action.

Dated, Cortland, N. Y., November 14, 1912.

DAVIS & LUSK,
Attorneys for Plaintiff.

O. & P. O. Address, 59 Main Street, Cortland, New York.

10 STATE OF NEW YORK,
County of Cortland, City of Cortland, ss:

James H. Barlow, being duly sworn, deposes and says that he is the plaintiff in this action; that he has read the foregoing Complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JAMES H. BARLOW.

Sworn to before me, this 14th day of November, 1912.

CHAS. H. GARDNER,
Notary Public.

Answer.

Title of Action.

Defendant answering the Complaint herein,—

First.

Denies that allegation of the subdivision of the Complaint marked "I" which alleges or tends to allege that at all the times thereinafter mentioned in the Complaint the defendant was "engaged in inter-

state commerce"; and further denies that allegation of the subdivision of the Complaint marked "II" which alleges or tends to allege that at all the times thereinafter mentioned in the Complaint the defendant was "conducting its said business as a common carrier engaged in commerce between the states of New York and Pennsylvania and elsewhere."

Second.

Denies that allegation contained in the subdivision of the
11 Complaint marked "III" which alleges or tends to allege that the plaintiff, at the time and place mentioned in said paragraph marked "III," was working for the defendant otherwise than as a locomotive engineer.

Third.

Denies each and every allegation contained in the subdivisions of the Complaint marked "IV," "V," and "VI."

Fourth.

Denies each and every allegation contained in the subdivision of the Complaint marked "VII" except that the defendant admits "that this action has been brought within two years after the occurrence of said accident and injury."

. .

Fifth.

Denies that allegation contained in the subdivision of the Complaint marked "VIII" which alleges or tends to allege that the plaintiff's injuries were caused or contributed to by reason of any negligence, carelessness or omission of duty on the part of the defendants or without negligence on the part of the plaintiff; and defendant further denies that it has any knowledge or information thereof sufficient to form a belief as to each and every other allegation contained in the subdivision of the Complaint marked "VIII" and not hereinbefore specifically denied.

Sixth.

Defendant further answering the Complaint herein and for a first separate and complete defense thereto, alleges on information and belief that whatever damages or injuries were sustained by the said James H. Barlow, at the time and place mentioned in the Complaint,
12 were so sustained by him solely by reason of his own contributory negligence and not by reason of any negligence on the part of this defendant.

Seventh.

Defendant further answering the Complaint herein and for a second separate, complete and distinct defense thereto, alleges upon information and belief that the plaintiff had been for a long time employed by the defendant as a locomotive engineer and had for a long

time been employed on the switch engine in the Cortland yards, and was familiar with all the conditions and dangers therein, and that at the time and place mentioned in the Complaint as such engineer he assumed the risk of his employment and that whatever injury the said plaintiff sustained at the time and place mentioned in the Complaint resulted from the said risk of his occupation or from the negligence or was caused by the negligence of a fellow-servant and not by the negligence of this defendant.

Wherefore, defendant demands that the Complaint herein be dismissed with the costs of this action.

TOMPKINS, COBB & COBB,
Attorneys for Defendant.

O. & P. O. Address, Savings Bank Bldg., Ithaca, N. Y.

STATE OF NEW YORK,
County of New York, ss:

E. A. Albright, being duly sworn, deposes and says that he is an officer of the defendant named in the foregoing Answer, to-wit, Assistant Secretary; that he has read the said Answer and knows the contents thereof and that the same is true of his own knowl-
13–15 edge, except as to those matters which are therein stated to be alleged upon information and belief, and that as to those matters he believes the same to be true.

That the reason why this verification is not made by defendant is because defendant is a foreign corporation and that deponent is an officer thereof, to-wit, Assistant Secretary.

That the sources of deponent's information and the grounds of his belief as to the matters which are not therein stated to be alleged of his own knowledge are the books, papers and records of the defendant, statements made to deponent by other officers and agents of defendant, besides his own knowledge as such Assistant Secretary.

E. A. ALBRIGHT.

Subscribed and sworn to before me, this 18th day of December, 1912.

C. L. MALCOLM,
Notary Public.

* * * * * * *

16 LELAND DANE, sworn for plaintiff.

Direct:

I reside in the City of Cortland. I was the conductor with the crew with which Mr. Barlow was working at the time he sustained his injuries. I am still employed by the defendant, working as conductor of the switching crew. I have heard the stipulation read here in reference to certain supply coal being placed on the trestle in defendant's yards here in the City of Cortland; that was on the 27th day of July, 1912; the day Mr. Barlow received his injuries. There

were no other cars of coal placed on the top of the trestle that day; there were six other cars placed down below the incline, after the accident, but the three cars we were placing upon the level of the coal trestle at the time that Mr. Barlow was injured, were the only three cars placed upon the level that day. The three cars were coupled on to the front of the engine. I rode upon the trestle with these cars; I rode the foot board of the engine on the right hand side. I should say the engine was running in an easterly direction going up on the trestle. The three coal cars were on the east end of the engine running up on that level. The engine stood just on the incline. The engine stopped. Clayton Truman was handling the engine at that time. I gave him a signal to go ahead, slack
17–20 ahead, he did, and I gave him a signal to back and he backed. The engine went back quick. The slacking and reversing were part of one transaction; trying to get the cars cut off; I couldn't get them cut off the first time; he had to give me slack in order to get a better pull; it was slack ahead and back all part of one movement, it was all right together as near as could be. I am pretty sure the bell was not ringing; I can't swear it was not; it is too long ago; I have forgotten, but I don't think it was.

"Q. Did you hear the bell?
A. No, I didn't.

* * * * * * *

After they had gotten up the incline there on the level place, these cars rested until they were afterward unloaded.

* * * * * * *

21 & 22 LEIGHTON H. COLE, for Plaintiff.

Direct:

* * * * * * *

23 When the engine started back, Mr. Valentine grabbed me by the jacket, although I didn't know it at the time, and pulled me back so I lay on these planks, and the engine started down; Mr. Barlow drew right across my legs and laid down there a little ways, it didn't seem but a short distance, and went out of
24–31 sight as the engine went over his leg there between the timbers of the trestle and the plank.

* * * * * * *

32 JAMES H. BARLOW, sworn for Plaintiff.

Direct.

Photographs, Exs. B, C, D, E, and F, received in evidence.

I am the plaintiff in this action. On the 27th day of July, 1912, I was employed by the defendant. At that time I was the engineer on the switch engine here in the yards in the City of Cortland; I had been employed as engineer on this switch engine about six years.

Prior to that I was on the passenger run between Canastota and Elmira and return; this run changed occasionally; I was in the passenger service in the neighborhood of twelve years, I can't tell exactly. It was my choice to be changed from the passenger service to the switch engine on account of being home all the while instead of being away from home as I lived in Cortland. I have been a locomotive engineer on this road about twenty-eight and a half years up to the time I was hurt. I was sixty years old at the time I sustained this injury. During the year 1912 the defendant ran two milk trains from Cortland to Sayre, Pa., daily; one I think goes down by way of Van Etten and one by way of the Central to Owego; both go to Sayre.

"Q. Now since then how many milk trains have they run?

Objected to anything after the accident.

The Court: We will take what they did both before and
33 after the accident and give you an exception."

I am speaking now of the year 1912. These trains were run by engines kept in this Round House and run out of here in the morning and got back here sometime in the evening.

"Q. Were these engines coaled daily at this coal pocket?

Objected to as incompetent, improper and immaterial, these engines.

Pl'ff's Counsel: I refer to the two milk trains.

Same objection.

Objection over-ruled.

Exception.

Witness: I suppose they were, I would never stay there to watch them.

I can't swear positively that the engines were coaled here each night, but they go out of here and go to Sayre and back and in all probability they are coaled here at night. The engines that are coaled here in the Cortland yards are coaled at the coal pocket just north of the Round House. There is only one place for coaling engines here; that is the coal pocket where these cars were being placed at the time I sustained my injury. I suppose these trains collect milk along the road; they are regular milk trains.

CHARLES N. PAGE, sworn for Plaintiff.

Direct:

I am employed by this railroad as Train Master and Master Mechanic. I reside at Auburn.

"Q. Now we are speaking of the engines which haul milk
34 trains from Cortland to Sayre; they are hauled from Cortland to Sayre daily?

Objected to unless it be before the accident, the 27th of July, 1912.

Objection over-ruled.

Exception.

Q. Take the year 1912, take the month of July and the months following that in the year 1912?

Objected to as incompetent, improper, immaterial what was done with the engine after the 27th of July and the date of this accident.
Objection over-ruled.
Exception.

A. Why, the engines were run on this train, run between Sayre, one of them run between Sayre and Cortland, the other engine runs between Owego, it is the second engine runs between Cortland and Sayre."

There are two milk trains going out of here in the forenoon, running from Cortland to Sayre; one on Sunday. These milk trains collected milk along the route. Sayre on the main line in the State of Pennsylvania was not the terminal; that is where this particular engine left the milk. There is only one coal pocket or place where we keep a supply of coal and coal engines here in the City of Cortland; that is near the Round House.

"Q. And that is the coal pockets where coal is placed by means of running cars on the trestle shown in Ex. B, C, D, E, and F, isn't it?

Objected to same as before.
Objection over-ruled.
35 Exception.

Witness: As I understand the question that all engines are coaled from this pocket?

Q. All engines that are coaled in Cortland yards are coaled from this pocket?

A. No, sir."

The engines that are not coaled from this pocket are coaled from cars along side of this pocket, quite regularly. They do not have particular engines that they coal from some other place besides this pocket; there are times when engines, any of the engines there may be coaled from cars instead of from the pocket. This is due to the cars, cars having flat bottoms, operating bottoms, cars that are self-unloading, it costs more money to dump a flat bottom car than a self-unloader. I can't recall, but I have the figures in the office that show how many engines are coaled from cars on the sides. About 60 per cent are flat bottom cars. I won't make this for the period of time that you state, because we did, to the best of my recollection, for the past six or eight months the coal has been run in that way. The open bottom cars are what we call self-unloading, they are more readily dumped from the pockets than you can from the car to the engine. The cars with the flat bottoms have no openings, we pick it up from the car to the engine with a clam shell. Some coal on the cars was used in coaling any engine that wanted it, and this coal that was in these pockets was used in coaling any engine that needed recoaling; both sources of supply were used for all of the engines there. The engines used in coaling these milk trains from Sayre,

Pa., were coaled here at this place from the pockets and from cars; this was the only source of supply for coal that we had here.

36 "Def't's Counsel: I move to strike out any of the witnesse's testimony that relates to coal, or the supply of coal, since this aaccident, or any coal used by the engines after this accident that run elsewhere than in the Cortland yard.

Motion denied.

Exception.

Q. Mr. Page, during this period were special trains run from Cortland into Pennsylvania?

Objected to as incompetent and improper.

Objection over-ruled.

Exception."

Outside of this train unless it was an extraordinary, special movement, our terminals would be at Van Etten. We keep freight engines in this yard at Cortland and they haul freight trains to Van Etten; Van Etten is within the State of New York, in Chemung County, I think about fifteen miles from Binghamton. Elmira is the end of this freight division. Elmira is on the same branch Van Etten is on. It depends on circumstances as to whether or not the freight engines going out of Cortland haul these freight trains just to Van Etten or on to Elmira; it depends on where the freight is to be moved to. Where they would leave the freight that was going into Pennsylvania depends on the way it was routed; it may be routed by way of Van Etten or by way of Elmira; we route our freight into Pennsylvania both by way of Van Etten and Elmira. I can't say that we have freight going daily to Pennsylvania by those routes; almost daily. I think it would be safe to say we had freight daily in Pennsylvania or outside of the State of New York by way

37 of Van Etten and Elmira. That freight was hauled by these engines kept here in this round house and taken through to Van Etten or Elmira and left there to be taken up by other engines and carried on into the other States. Freight engines that are kept in this round house are coaled at Cortland. The engine used in hauling these trains to Van Etten was kept in the Elmira round house, or at the Elmira Terminal. This is the headquarters for this branch; some of our freight engines are kept here and coaled here; they are used to take cars from here to Van Etten, or to Elmira such as I have described, and were during this period. These freight engines are coaled out of this pocket and take these cars as I have testified in reference to hauling and engine also.

"Q. And freight that was going outside of the State of New York, by way of the New York Central, where would that be carried to?

Objected to as incompetent, improper and immaterial.

Objection over-ruled.

Exception.

A. Why, there would possibly be two places for interchange of

that freight, probably be Auburn, might make it four places; Auburn, Weedsport, Sterling and Canastota.

"Q. Take for instance, Canastota?

A. We may add another one to that,—Camden."

When there was freight going outside of the State of New York, by way of the New York Central, some of that would be taken to Camden and Canastota. I want to qualify that. I don't believe the New York Central—there is one other line runs into
38 Camden; I don't believe it is the New York Central,—to Rome, Watertown and Ogdensburg. That is the New York Central. Possibly we did have freight during this period pass outside of the State of New York, going in that direction; we probably did. We were probably hauling cars and delivering them there to the New York Central line, and taking cars from there and bringing them here to Cortland, and cars which came outside of the State of New York and cars where the freight was going outside of the State of New York; and cars that were hauled to Camden and Canastota by engines kept here in this round house. Some of the engines during this period coaled here in these pockets and took these cars; not in carload lots; there were probably engines started at Canastota that were coaled at that point. The same would be true of these other points where freight was carried from Cortland and left to be taken up by our men and taken outside of the State of New York. I don't think that I can testify that there were a good many whole carloads of freight going out of the City of Cortland to points outside of the State of New York over our line, because I really don't know. I am not familiar with the shipping done from the Wickwire plant; I know the amount of business here in hauling, but I am not familiar with their shipping points, and as I say, we get quite a number of carloads of business that I wouldn't know the destination of. During these months in the summer there would be a good many loads of potatoes and other produce shipped out of your region in Cortland; I know that the Lehigh Division interchanges, but as I say, I can't tell their destination. Possibly the destination of all of them would be outside the State of New York; probably a large part of that goes to New York City and Jersey City and Phila-
39 delphia; as I said before I have not handled the billings of those cars; have nothing to do with it, it is out of my line of business and therefore, I wouldn't like to say positively whether the majority of this business does or not.

"The Court: Mr. Page, do you know how many engines,—about how many, the average of engines, coal at Cortland daily?

A. I would say between——

Objected to as incompetent, improper and immaterial.

Objection over-ruled.

Exception.

The Witness: I would say between 12 and 15 engines in 24 hours.

The Court: Coal at Cortland daily?

The Witness: Yes.

The Court: And they were coaled there from these pockets or from cars, as might be most convenient at the time?

The Witness: Yes.

The Court: And some of those engines ran daily into Pennsylvania?

The Witness: Yes.

The Court: With milk or freight?

The Witness: Yes.

The Court: About how many of the 12 ran into Pennsylvania with freight and milk?

The Witness: Why, now, I might—you consider milk freight?

The Court: Well, milk and freight.

40–48 The Witness: Now, unless you consider milk freight I would like to say that there is no engine, unless it is a special movement that haul- freight from this territory into Pennsylvania. There are two milk engines that haul milk into Pennsylvania, both, except Sunday.

The Court: And they coal here at Cortland?

The Witness: Yes, both engines coal here.

The Court: And these conditions existed both before July 27th, 1912, and afterwards, substantially the same as you have described it?

The Witness: Yes, sir.

Objected to and asked to strike it out as incompetent and improper.

Motion denied.

Exception.

The Court: The question whether a road is engaged in interstate commerce, that is, just simply transporting freight within a state, I should think it quite probable that *that* were not engaged in interstate commerce at all, if its engine did not pass out of the state.

Pl'ff's Counsel: I don't think there is any. I have not seen any. Of engines that did not pass out of the state, that that engine isn't engaged in interstate commerce simply because some car happened to be on its train pass out of the state. If so every train in the country has some cars that are taken out by their trains."

* * * * * * *

49–80 After that I turned around and got off the engine, and went back to fix the brake beam. When I got off Mr. Cole was there. I didn't notice Mr. Valentine there at the time, and I can't tell whether he was still on the engine, or whether he got off ahead of me, while my back was to him talking to Mr. Truman, or whether he followed me off the engine, I couldn't tell. Mr. Cole was down in the way where I couldn't work, at the outside, so I crawled part way under the tank and stuck my left hand over in to find out what the difficulty was and about that time he started. He let the brake off and reversed the engine and started her very quickly; the brakes were all off and the engine reversed; it started quickly to back up; it was a very quick, sudden movement. I tried my best to get out

of there and when I got out I went down through the trestle; my leg was run over in getting out. I was dragged along probably eight or ten feet before it ran over my leg; during this time I was trying to ger out from under it. My right leg was run over. I can't say whether I went through the trestle or over the edge of it, it was done very quick and when I was brought up I was down on the ground. I did not hear the bell or whistle, or any other signal before the engine started.

* * * * * * *

81 Plaintiff Rests.

Def't's Counsel: At this time the defendant moves for a nonsuit and a dismissal of the complaint, upon the following grounds: First, plaintiff has failed to prove facts sufficient to constitute a cause of action. Second, plaintiff has failed to prove any negligence on the part of defendant's employees, or the defendant. Third, that the plaintiff has failed to show himself free from contributory negligence.

I would like to take a ruling upon the motion, then I would like to make other motions.

The Court: I will be warranted in submitting the case to the jury; I therefore, deny your motion and give you an exception.

Def't's Counsel: I ask your Honor at the close of the plaintiff's case to dismiss the complaint as to any cause of action which the plaintiff alleges therein, and any right to recover as alleged therein; under the common law upon the proof in this case the plaintiff is not entitled to recover.

The Court: I so hold.

Def't's Counsel: I now ask your Honor to dismiss the complaint as to any cause of action which plaintiff alleges or tends to allege in the complaint, based upon the Employers' Liability Act of the State of New York, upon the ground the proof will not warrant a recovery under that act.

The Court: I deny your motion.

82 Exception.

Def't's Counsel: I also ask you to hold, and to dismiss the complaint, upon the ground, as to any allegation therein, upon the section of the Railroad Law known as the Barnes Act, Section 4208, upon the ground the proof in this case is not sufficient to warrant a recovery by the plaintiff.

The Court: That Barnes Act is the negligence of a superior officer; I didn't have that in mind.

Def't's Counsel: Yes.

The Court: I think I will grant your motion as to that.

Def't's Counsel: I ask your Honor to dismiss the complaint as to any allegation therein which alleges, or tends to allege, any right to a cause of action under what is known as the Federal Liability Act, on the ground that the proof in this case is not sufficient to warrant a recovery thereunder.

The Court: I am not prepared to say that the transportation of

coal, as I have stated, from Sayre to Cortland, for uses of its own, is interstate commerce, but I think the evidence in this case required findings upon my part first that the coal that was on these three coal cars came from Pennsylvania of these three cars; second, that this coal belonged to the defendant and was being put upon this trestle and into these coal pockets for the use of the defendant in coaling or supplying its engines with coal. No doubt about that. Third, that it was intended by the defendant that the engines drawing its daily milk train from Cortland, New York, to Sayre, Pennsylvania, should be supplied with this coal which was being then put upon the trestle and that they afterwards did use the coal, or some portions of it, in coaling or supplying these engines with coal for hauling these milk trains.

83–85 Def't's Counsel: To that we take an exception, to the evidence of anything that occurred after this accident, and then, further, there is no actual proof that these work engines or any of the freight engines were actually coaled out of these three cars. Now, 60 per cent of this coal was from flat cars. Now, we don't know as a fact that any of these engines were coaled from any of these three cars.

The Court: Suppose I am required to make a finding on that subject, in all probability they did, and if I am required to make a finding one way or the other upon it, I think I would have to find that some of these engines drawing the milk train were coaled from this particular coal. I think the probability is that way, so if I am required to make a finding upon that, I should find that way.

Def't's Counsel: To that we except.

The Court: And I think that those facts bring this plaintiff within the Federal Employers' Liability Act.

Def't's Counsel: To that we except.

The Court: We will submit the case to the jury under the Federal Employers' Liability Act.

Def't's Counsel: Then do I understand the Employers' Liability Act in this state your Honor holds does not apply?

The Court: I hold against you on that and give you an exception, but I shall submit the question to the jury mainly under the Federal Employers' Liability Act."

* * * * * * *

86–89 CLAUD J. VALENTINE, sworn for Defendant.

Direct examination:

* * * * * * *

I was on the engine at the time it went up on the trestle.

* * * * * * *

90–93 When Mr. Barlow was under the engine, first I just simply said that I was afraid they were going to move the engine, and they were busy, don't know whether they heard me or not; the second time when they took the slack, when they un-

coupled the engine, I called to look out; I caught Mr. Cole and Mr. Barlow; caught Mr. Cole by the back and Mr. Barlow by the lower part of his jacket. At this time Truman was on the opposite side in the window.

* * * * * * *

CLAUD J. VALENTINE, for Defendant:

Cross-examination:

* * * * * * *

When this engine got to the top and the cars were on the level, it stopped a very short time. In moving either way the cars were in their proper place. The next business that the engine had was to back down and do some other work; it did remain there a very short time after the cars were put up.

* * * * * * *

94 CLAYTON TRUMAN, sworn for Defendant:

Direct examination:

I reside in the City of Cortland. I am employed by the Lehigh Valley Railroad Company. I have been in the railroad business pretty close to five years and three or four months. I am an engineer. In July, 1912, my position was extra engineer; I was acting as fireman at that time; I got set back. I was acting as fireman upon the same engine where Mr. Barlow was employed. I was firing upon that engine in the forenoon on the 27th of July, 1912. Shortly after dinner, Mr. Barlow requested me to take his place and I did. At that time the engine was switching in the yard. We generally put up supply coal right after dinner. In the afternoon of the 27th I was engaged in placing coal cars upon the trestle. Mr. Barlow was on the engine doing my work as fireman. Of course, shunting around the yard we would be in different places on the engine; I can't say where Mr. Barlow was when we went up on the trestle; he was doing fireman's work; that didn't
95–110 call for his presence in the cab necessarily; he could stand wherever he had a mind to, providing he had steam enough on up the trestle. I was in the cab on the right hand side. Mr. Valentine was there opposite me on the left hand side. There was a window on the right hand side and also one on the left hand side. Dane was conductor at that time. As we ascended that trestle, Mr. Dane stood on the foot board, on the front end of the engine, right hand side. I could see him very plainly from the cab. I was looking out of the cab window. As I approached the top of the trestle, I was watching him for a signal to stop, so we could place the cars wherever we wanted them; I got a signal to stop. I stopped and applied the brakes; I stopped just as he wanted me to, and the first time the knuckles were cramped so he couldn't raise the lever that raised the pin up to cut the engine from the car; I waited a few minutes, and the steam from the steam chest and cylinder kind of escaped out and she started back herself; then I gave

her a little bit more steam to move her up, to raise the knuckles up so he could raise the lever to raise the pin. After he shut the lever off, he gave the signal to back up and I did so. He gave me a circular signal to back up. I don't know where Mr. Barlow was at the time I got the movement to back up. I didn't hear Mr. Barlow come into the cab and say anything to me. He might have come into the cab, but it being a strange place for me, I didn't see the man come anywheres near me during this time, from the time I left the main track. The last time I remember seeing Mr. Barlow was just as I started off the main track to put the coal upon the trestle.

* * * * * * *

111 Plaintiff rests.

Evidence closed.

"Def't's Counsel: If the Court please, at this time the defendant renews its motion made at the close of the plaintiff's case for the direction of a verdict in its favor upon all the grounds stated at the time the motion was made at the close of the plaintiff's case, and upon the additional ground that it now conclusively appears that the defendant here was not negligent and further, that when these men were upon this engine Mr. Barlow and Mr. Truman, at that time Mr. Barlow, the plaintiff, had turned this engine over to the fireman to run it and under Rule 1044 he was responsible for any improper movement of that engine, if there were such by this fireman, and that there is no proof, in fact, the proof is, that when Mr. Barlow turned this engine over to this fireman no one knew it except the two men, and he was acting from that time on in a different capacity to this railroad company and they are not responsible for his acts at any time he was outside of the scope of his authority without their knowledge.

The Court: I think under the evidence that I cannot hold, as matter of law, that Mr. Truman or Mr. Barlow had so violated their duties as to defeat the plaintiff's action by the exchange of places, one from fireman to engineer, and the other from engineer to fireman, so I will deny your motion.

Exception.

Def't's Counsel: Now, I ask your Honor to hold, as matter of law, that the burden of proof is upon the plaintiff to show by the fair preponderance of evidence that the defendant was guilty of negligence, or its servants.

The Court: That is like a request to charge, isn't it?

112 Deft's Counsel: I think so.

The Court: Is there anything in this Federal Act upon the burden of proof? I will have to look at the Act before I rule on that.

Def't's Counsel: I will leave that until later then. I ask your Honor to hold as matter of law, that the burden of proof is on the plaintiff to show he was free from contributory negligence.

The Court: I am not prepared to rule on the burden of proof until I see whether there is anything in the statute.

Def't's Counsel: I ask your Honor to hold, as matter of law, that

the plaintiff cannot recover in this case under this proof by reason of any defect or insufficiency in the brake hanger and guard, or any other defect, or insufficiency, upon this engine.

The Court: I will so hold. I think the two questions for the jury, is the plaintiff's negligence and Mr. Truman's negligence.

Def't's Counsel: And upon the other two motions?

The Court: I will rule later.

Charge.

"The Court: Gentlemen of the Jury, this plaintiff, James H. Barlow, brings this action against the defendant to recover damages for injuries which he received while in the defendant's employ on the 27th day of July, 1912.

Now, this action is what we call an action based on allegations of negligence. That is, he says, and the burden of proof is upon him to establish it, that another employee of this defendant was negligent, and that the negligence of that employee caused his injuries.

113 It is proper for me at the outset, perhaps to state to you the definition of negligence. Negligence is the failure to observe due care, and due care is the care which an ordinary prudent man observes and takes under like conditions and like circumstances. Of course the care which an ordinary prudent man observes varies in respect to the conditions existing. That is, the greater the degree of danger the greater care required, and an ordinary prudent man if he was handling dangerous machinery and dangerous tools, or was in a dangerous locality, of course, would exercise greater care than he would under conditions where there was no danger and no risk to be run, apparent in the degree of danger to be apprehended. But it is the degree of care which an ordinary prudent man would take under the same conditions and same circumstances.

Now, accidents happen, frequently happen, when no one is really to blame, when it is impossible to fix any blame upon any individual, any party. In such cases there can be no cause of action no matter how sorely the person may be injured, no cause of action unless someone has been negligent and is therefore to blame for the accident. In this case, if the plaintiff's own negligence was the cause of the accident, the sole cause of the accident, and his injuries resulted solely from his own negligence, then he cannot recover in this action, because neither the railroad company, that is the defendant, nor its employees not having been to blame he would have no cause of action whatever if his own negligence caused this accident. In other words, under the facts proven in this case, he cannot recover unless you find from the evidence that Clayton Truman was negligent. No negligence is claimed against any other person. The plaintiff alleges and claims, that Clayton Truman, who was at the time handling this engine as engineer, this locomotive, they

114 say it was his negligence that caused this man's injuries.

Now, that is a question for you to decide; that and the plaintiff's negligence are the crucial questions in this case; they are the

questions upon which whether the plaintiff shall recover anything or not must turn. I think I have made that clear enough to you and you can carry those two propositions in your mind.

At the outset of this case, at the very threshhold, you must determine whether the plaintiff's injuries were caused wholly by his own negligence. If so, he cannot recover. But if you say they were not caused wholly by his own negligence, then was Clayton Truman negligent? If he was not the plaintiff cannot recover. But if Clayton Truman—if the plaintiff, I will say first, was negligent that does not under this Federal Statute prevent any kind of a recovery if Clayton Truman was negligent. Under our State laws if the plaintiff is negligent at all and his negligence contributes in any degree to the accident he cannot recover, no matter how negligent the defendant is. But the Federal Statute which we have heard here changes that rule somewhat, and under the Federal Statute he may recover though he is negligent he may recover damages in case another employee was negligent and that other employee's negligence caused the accident and his injuries. That is the distinction.

Now, passing back to these questions once more so that I may be sure you may bear them in your minds, the first proposition is, if you please, was his own negligence the sole cause of his injuries? If so, he cannot recover. Secondly, was Clayton Truman negligent and did his negligence contribute to the injuries which the plaintiff received? If so, he may recover.

Upon the question of negligence of these parties it may be desirable that I go a little further and very briefly call your attention to some things that have been testified to with reference to what the plaintiff's counsel claims that Truman was negligent in two respects. First, they claim that he was told by Mr. Barlow that he was going out to fix the brake beam and that he should hold the engine still, and that he did not comply with that instruction. Secondly they say that he should not have started the engine back without ringing the bell. Upon these two propositions we had first the testimony of Mr. Dane, conductor, who says it was not customary to ring the bell on this trestle; and Mr. Cole a trainman, who says it is not customary to ring the bell at this point. He says further, "I did not rely upon its being sounded when I was under the engine with Mr. Barlow because I supposed Barlow had told Truman to remain still; if the crew was all in sight the bell was not sounded, if not in sight it was sounded." Mr. Barlow, the plaintiff, says in respect to that, that as the engine stopped he saw Mr. Cole coming up the incline on a run and that Mr. Valentine was on the left hand side of the engine cab and as the engine stopped I stepped over to the north side and Cole said "The brakebeam is down". "I went forward and told Truman the brakebeam is down again, stand still, don't move her, stand right where you are until I fix it. I certainly thought I spoke loud enough so he could hear me. His face was only about four feet from mine and he was looking at me." Mr. Barlow says further, "I did not always ring the bell when I was in charge of the engine putting up coal, but did if I couldn't see where the crew were." Mr. Truman says in respect to that, "It is

not customary to ring the bell when on this trestle. When I went to Barlow under the trestle he said, 'Why did I go under and why did you move her?' I said, 'I didn't know you were going under', then he said 'you must have misunderstrood me' ". So it seems that there was something said about it between Mr. Truman and Mr.
116 Barlow after his injuries and when he was down underneath the trestle after he had sustained the injury. Of course, much more has been said by some of these witnesses bearing upon that question. I have only called your attention, thinking that it might be of some service to you, to the salient points of their testimony upon this subject of what was said or claimed to be said between Barlow and Truman and what they claim with reference to the ringing of the bell.

Now, gentlemen, if as I said before, the cause of this sad accident and the injury was Mr. Barlow's own negligence solely, then he cannot recover of this defendant, and if Mr. Truman was not negligent, that is, if Mr. Truman exercised the ordinary care which a reasonably prudent man would exercise in the same place where he was and under the same conditions, then he was not negligent, and if you shall find that Mr. Barlow was not negligent at all, that his negligence did not in any way contribute to his injury, and that his accident and his injury were caused solely by Mr. Truman's negligence, then Mr. Barlow would be entitled to recover full compensation for the injuries which he has received. But this Federal Statute under which this case is being tried and without which the plaintiff could not recover in this case, provides, "The fact that an employee who was injured may have been guilty of contributory negligence shall not completely bar a recovery but the damages shall be *dismissed* by the jury in proportion to the amount of his negligence." That is, if you find Truman was negligent and therefore Barlow has a right to recover, and you find Barlow was negligent, then you diminish the damages under this act in proportion to the negligence of Mr. Barlow. That leaves rather a peculiar situation for a jury, but they are to take this act in the words in which it is adopted and apply it as best they can to a case where both patries are negligent if that is this case.

Now, if Mr. Barlow is entitled to recover full damages, that
117 is, if he was free from any negligence which contributed to the accident and the accident and his injuries were due solely to the negligence of Mr. Truman, then he would be entitled to full compensation for the pain and suffering which he has sustained, for the loss of his limb, for the injury to his shoulder, for the disfigurement and impairment of his physical condition which the accident has caused, and for his doctor bills, one of which is said to be $122.50 and another $25, *for and* the loss of wages. He says he was earning from $105 to $110 a month and you will take that into consideration. Take into consideration his age, which was about sixty years when he received this injury; taking into consideration his age, his employment and earnings and the physical injuries which he has sustained, and as I say, if he was free from negligence and the other man was negligent, then he would be entitled to recover full compen-

sation for all those inuries. But if Barlow was negligent, then his recovery shall be diminished by the jury in proportion to the amount of his negligence.

I do not think of anything further that will be of any service to you in deciding this case. Of course you should decide it without any sympathy, without any prejudice. Justice cannot be done upon lines of sympathy, nor should prejudice enter into the verdict of a jury. You should decide it just the same as you would if it was between two of your neighbors. As has been said to you Mr. Truman was one of your neighbors and Mr. Barlow the other, and Mr. Barlow has sued Mr. Truman for damages for negligence and you were called upon to say which one was to blame, or whether they were both to blame, and whether Mr. Barlow was to recover, decide this case exactly as though the suit was between Mr. Barlow and Mr. Truman. Now, take this case and under these instructions give it careful consideration, such deliberation as the importance of
118 the case demands and render a verdict which shall be in accordance with these rules of law which I have given you and in accordance with the truth of the case.

Def't's Counsel: I except to your Honor submitting the question to the jury under the Federal Statute.

The Court: Yes.

Def't's Counsel: I ask your Honor to intsruct the jury that Mr. Truman had the right at the time he was operating this engine to rely upon the signal of the conductor in starting it back, providing he did not know that Mr. Barlow had left the engine.

The Court: I think I will decline that in the language in which you request, but I will say, that they are to take into consideration the fact that the signals of the conductor were such as Mr. Truman had a right to watch for and to obey in case he was not in a situation to apprehend any danger to anybody else. But whether he should have backed up the engine at this time I leave as a question of fact for the jury under all the instructions which I have given them, whether it was negligent for him to have run it back I leave to the jury, and decline to charge in the very words you have said, and give you an exception.

Def't's Counsel: Also to the modified charge.

The Court: Yes.

Def't's Counsel: Now, I ask your Honor to instruct the jury if they believe Mr. Truman did not hear Mr. Barlow say to him that the hanger was down, not to back up the engine, or that in substance, then there cannot be any recovery in this case.

The Court: I decline to charge that in the language that you request and leave it to them to say whether under all the conditions and circumstances he is chargeable with negligence.

119 & 120 Def't's Counsel: We except to that and to the modified charge."

* * * * * * *

121 EXHIBIT A.

Supreme Court, Courtland County.

JAMES H. BARLOW, Plaintiff,
against
LEHIGH VALLEY RAILROAD COMPANY, Defendant.

It is hereby stipulated, That the three cars of defendant's supply coal placed upon the trestle in the defendant's yards near the round house in the City of Cortland, New York, on the 27th day of July, 1912, at which time plaintiff sustained the injuries for which this action is brought, were the following cars: Lehigh Valley Car No. 19402, Lehigh Valley car No. 49034 and Lehigh Valley Car No. 54907. That the said cars were shipped out and billed out of Sayre, Pennsylvania, to Cortland, New York, upon a way card issued at Sayre, Pennsylvania, and came by defendant's road where they were placed upon switches and sidings and there remained until they were placed upon the coal trestle on the 27th day of July, 1912.

That said Lehigh Valley Car No. 19402 was received in the said yard at Cortland, New York, on July 3, 1912; and that said Lehigh Valley Cars Nos. 49034 and 54907 were received in the yards of the defendant at the city of Cortland, New York, on July 10th, 1912.

That said cars were all loaded with supply coal which was
122-125 used in coaling intrastate and interstate engines or locomotives kept in defendant's round house at Cortland, New York.

Dated, Cortland, N. Y., April 8, 1913.

DAVIS & LUSK,
Attorneys for Plaintiff.

TOMPKINS, COBB & COBB,
Attorneys for Defendant.

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126 *Opinion of Appellate Division.*

262-102.

Supreme Court, Appellate Division, Third Department.

JAMES H. BARLOW, Respondent,
against
LEHIGH VALLEY RAILROAD COMPANY, Appellant.

Argued, September Term, 1913.
Decided, November Term, 1913.

Smith, P. J.,
Lyon, Howard, Woodward,
Associate Justices.

127 Appeal by the defendant from a judgment of the Supreme Court in favor of the plaintiff entered in the office of the Clerk of the County of Cortland on the 18th day of April, 1913, and from an order denying the motion to set aside the verdict and for a new trial entered in said Clerk's office on the same day.

Appearances:

For Appellate—Tompkins, Cobb & Cobb.
For Respondent—Davis & Lusk.

LYON, *J.:*

The important question involved upon this appeal is whether the plaintiff was employed in interstate commerce at the time he received the injuries complained of, and hence whether the action is maintainable under the Federal Employers' Liability Act. The material facts are undisputed. A portion of one of the divisions of defendant's railroad extended from Cortland, N. Y., southerly to Sayre, Pa., and beyond, and from Cortland northerly to Canastota, N. Y., where it intersected the New York Central Railroad. During the month of July, 1912, the Defendant was running two milk trains each week day and one on Sunday from Cortland through Sayre to points farther south, and was also running trains carrying freight and passengers daily between Cortland and Sayre, and between Cortland and Canastota and other points, connecting with the New York Central Railroad, carrying cars and freight consigned to within and without state points. The locomotives drawing these trains northerly did not pass without the state, and those going to Sayre, excepting those drawing milk trains which ran through to
128 Sayre, were replaced by other locomotives at Elmira, N. Y., or Van Etten, N. Y., excepting upon extraordinary occasions or in emergencies.

On July 27th, 1912, three car loads of defendant's coal contained

in cars which could be dumped and which had been shipped by it from Sayre to Cortland, one of which had been received at the latter place July third and the other two July tenth, and placed on a siding to be used whenever required in coaling defendant's locomotives, were taken from the siding by defendant's yard engine, of which plaintiff was the engineer, and pushed on defendant's elevated coal trestle at Cortland to be dumped into defendant's coal pockets from which the coal was to be discharged through shutes into the tenders of defendant's locomotives, whether used about the Cortland yard or in interstate or intrastate commerce. These coal pockets supplied about forty per cent of the coal used at Cortland by defendant's locomotives, and the remaining sixty per cent was shoveled into the tenders from flat cars which did not have open bottoms, and hence could not be dumped, standing in the Cortland yards.

After the switch engine had pushed the three cars of coal upon the trestle and while standing upon the trestle in charge of the fireman who at plaintiff's request had temporarily exchanged places with plaintiff, the attention of the plaintiff was called to the fact that one end of the brake beam of the tank was down, whereupon the plaintiff and another employee of the defendant endeavored to fix it. While the plaintiff was partly under the tank, the conductor signalled to the fireman to back the engine, which the fireman did suddenly, without giving any signal, and the plaintiff was caught under the wheels, his right leg severed and other serious injuries inflicted to recover damages on account of which this action has been brought. Upon the trial it was conceded that the coal con-
129 tained in the three cars was used in coaling intra state and inter state locomotives kept in defendant's round house at Cortland. The Trial Judge submitted the case to the jury under Federal Statute, charging them that the fact that an employee who was injured may have been guilty of contributory negligence shall not completely bar a recovery, but the damage shall be diminished by the jury in proportion to the amount of his negligence. The defendant duly excepted to the submission of the case to the jury under the Federal Statute, and the validity of such exception furnished the serious question for consideration upon this appeal from the judgment entered upon a verdict in favor of the plaintiff.

The Statute entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases" (35 Stat. at L. 65, Chap. 149 as amended 36 Stat. at L. 291, Chap. 143, U. S. Comp. Stat. Supp. 1911 pp. 1322, 1324), commonly known as the Federal Employers' Liability Act, provided so far as is material to be noticed here," that every common carrier by railroad, while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier * * *"

The crucial question is, was the plaintiff at the time he sustained the injuries complained of, employed by the defendant in interstate commerce within the meaning of the act. The only authority

necessary to be considered by us is the case of Pedersen vs. Delaware, Lackawanna & Western Railroad Co., 229 U. S. 146, which refers to all the leading cases bearing upon the question.

130 In that case, decided by a divided Court, it was held that the plaintiff who was an iron worker in the employ of defendant, which was engaged in transporting passengers and freight by railroad, in both inter state and intra state commerce and who was injured, through the negligence of a co-employee by being run down by an intra state passenger train, while plaintiff was carrying a sack of bolts to be used in repairing a bridge which was regularly in use in both interstate and intrastate commerce, was employed in inter state commerce within the meaning of the Federal Employers' Liability Act. In the prevailing opinion the Court says, "Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency the commerce depends in large measure upon this being done * * *. The true test always is: Is the work in question a part of the inter state commerce in which the carrier is engaged * * * True a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition, for use from being an employment in inter state commerce * * * It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was part of a larger one, as is the case when an engineer takes his engine from the round house to the track on which are the cars he is to haul in interstate commerce."

In the dissenting opinion it is said, "Transportation has been defined as commerce, and those engaged in transportation are employed in commerce * * *." "It is conceded that a line

131 must be drawn between those employees of the carrier who are employed in commerce and those engaged in other departments of its business. It must be drawn so as to take in, on one side, those engaged in transportation, which is commerce; otherwise there is no logical reason why it should not include every agent of the company; for there is no other test by which to determine when he must sue under the state statute and when under the act of Congress; for if a man on his way to repair a bridge is engaged in interstate commerce, then the man in the shop who made the bolts to be used in repairing the bridge is likewise so engaged. If they are, then the man who paid them their wages, and the bookkeeper who entered those payments in the accounts, are similarly engaged. For they are all employed by the carrier, and the work of each contributed to its success in hauling freight and passengers."

The respondent contends that at the time of receiving the injuries he was employed in interstate commerce in two senses, that he was engaged in the work of delivering upon the coal trestle, coal

which had been shipped from Sayre for that purpose, the delivery of which had been temporarily suspended during the time the car had remained upon the siding; and that he was engaged in delivering coal to be necessarily used in part by locomotives employed in hauling trains engaged in inter state commerce. He also contends that to switch interstate cars was to engage in interstate commerce. Citing Thornton's Federal Employers' Liability Acts, 2nd Ed. pp. 48 49 Johnson vs. Southern Pacific R. R. P. 196 U. S. I.

Undoubtedly the ultimate destination of the three car loads of coal were the coal pockets which could only be reached by running the cars upon the trestle. Depositing the coal in the pockets was one step towards placing it in the tenders of the locomo-
132–135 tives. How different would have been the liability of the defendant if plaintiff had been injured while dumping the coal directly into the tender of the locomotive attached to a train engaged in interstate commerce?

Coal for use in defendant's locomotives was as indispensable to the defendant engaging in interstate commerce as was a track or safe bridge upon which defendant might operate its trains.

While it is by no means clear that the plaintiff was engaged in interstate commerce within the meaning of that term as used in the Federal Employers' Liability Act, yet we are inclined under the authority of the Pederson Case to affirm the judgment.

* * * * * * *

136 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 5th day of February, in the year of our Lord one thousand nine hundred and fifteen, before the Judges of said Court.

Witness, the Hon. Willard Bartlett, Chief Judge, presiding.
R. M. BARBER, *Clerk.*

Remittitur. February 6th, 1915.

JAMES H. BARLOW, Respondent,
ag'st
LEHIGH VALLEY RAILROAD COMPANY, Appellant.

Be it remembered, That on the 24th day of February in the year of our Lord one thousand nine hundred and fourteen Lehigh Valley Railroad Company the appellant in this action, came here into the Court of Appeals, by Tompkins, Cobb & Cobb, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And James H. Barlow

the respondent in said action, afterwards appeared in said Court of Appeals by Davis & Lusk, his attorneys.

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

137 Whereupon, the said Court of Appeals having heard this cause argued by Mr. Peter F. McAllister of counsel for the appellant, and by Mr. Clayton R. Lusk of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from in this action, be in all things affirmed. And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this Court.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

138 COURT OF APPEALS,
Clerk's Office:

ALBANY, February 6th, 1915.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[L. S.] R. M. BARBER, *Clerk.*

STATE OF NEW YORK,
Cortland County, Clerk's Office, ss:

I, Edward S. Dalton, Clerk of said County, and of the Supreme and County Courts therein, the same being Courts of Record, do hereby certify that I have compared the foregoing with the original now on file in said office, and that it is a correct transcript therefrom and of the whole of said original Appeal Book and remittitur together with endorsements thereon.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said County and Courts, at the City of Cortland, this 18th day of March, 1915.

[Seal Cortland County.]

E. S. DALTON, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 3/18/15. E. S. D.]

139 At a Special Term of Supreme Court Held at the Court House in the Village of Walton, Held in and for the County of Delaware, Commencing on the 13th day of February, 1915.

Present: Hon. Albert H. Sewell, Justice Presiding.

Supreme Court, Cortland County.

JAMES H. BARLOW, Plaintiff,
against
LEHIGH VALLEY RAILROAD COMPANY, Defendant.

The above named defendant having appealed to the Court of Appeals of the State of New York from the judgment of affirmance entered and filed in the office of the Clerk of the County of Cortland on the 20th day of November, 1913, whereby it was adjudged that the judgment entered in this action on the 13th day of April, 1913, be affirmed, and further adjudged that the plaintiff recover from the defendant the sum of one hundred dollars and sixty-two cents ($100.62) costs, and the said appeal having been duly argued at the Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be *and* all things affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court there to be proceeded upon according to law; now on reading and filing the remittitur from the Court of Appeals herein and upon motion of Rowland L. Davis, one of the attorneys for the plaintiff, it is

140 Ordered, that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court.

Enter in Cortland County:

A. H. SEWELL.
Justice of the Supreme Court.

[Endorsed:] Supreme Court Cortland County. James H. Barlow, Plaintiff, against Lehigh Valley Railroad Company, Defendant. Copy. Order for Judgment on Remittitur. Cortland County, Clerk's Office. Filed & Ent. Feb. 15, 1915, at 10,05 o'clock, a. m. E. S. Dalton, Clerk.

141 STATE OF NEW YORK,
County of Cortland, ss:

I, E. S. Dalton, Clerk of the County of Cortland and of the Supreme Court therein, the same being a court of record, do hereby certify that I have compared the foregoing return on appeal, Remittitur from the Court of Appeals, and Order of the Supreme Court making the Judgment of the Court of Appeals the Judgment of the Supreme Court, with the originals being and remaining on file in my office, and that the same are true and correct transcripts of said originals and of the whole thereof.

In witness whereof, I have hereunto set my hand and official seal at the City of Cortland this 2nd day of July, 1915.

[Seal Cortland County.]

E. S. DALTON,
County Clerk of Cortland County.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 7/2/15. E. S. D.]

142 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court upon a remittitur from the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James H. Barlow, Plaintiff and Lehigh Valley Railroad Company, Defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right,
143 privilege, or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Defendant, Lehigh Valley Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concern-

ing the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the seventh day of June, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by:
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

144 [Endorsed:] Supreme Court of the United States, October term, 1914. Lehigh Valley Railroad Co., Plaintiff in Error, vs. James H. Barlow. Writ of Error. Cortland County Clerk's Office. Filed Jul- 1, 1915, at — o'clock — M. E. S. Dalton, Clerk.

145 STATE OF NEW YORK:

Supreme Court, Cortland County.

JAMES H. BARLOW, Plaintiff-Respondent,
against
LEHIGH VALLEY RAILROAD COMPANY, Defendant-Appellant.

To the Hon. Charles E. Hughes, Justice of the Supreme Court of the United States:

The Lehigh Valley Railroad Company, defendant-appellant in the above entitled cause, shows by this Petition that in the records, proceedings and decisions in the Court of Appeals of the State of New York, the same being the highest Court of said State in which a decision could be had in this suit, a manifest error has occurred greatly to the damage of said Lehigh Valley Railroad Company.

That, as appears in the record and proceedings, there was drawn in issue the question whether the Federal Employers' Liability Act, 1908, and Amendments thereto, were applicable to the facts of the case, thus depriving Lehigh Valley Railroad Company of the common law and statutory defenses and rules of the State of New York; all of which fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

Wherefore, petitioner prays that a writ of error be allowed and that a transcript of record, proceedings and papers upon which said Decree was entered, duly authenticated, be ordered sent to the Su-

preme Court of the United States at Washington, D. C. under the rules of such Court in such cases made and provided; and that the same be by this Honorable Court inspected and corrected in accordance with law and justice.

(Signed) COBB, COBB, McALLISTER & FEINBERG,
Solicitors.

146 [Endorsed:] State of New York. Supreme Court, Cortland County. James H. Barlow, Plaintiff-Respondent, against Lehigh Valley Railroad Company, Defendant-Appellant. Petition for Writ of Error. Original. Cobb, Cobb, McAllister & Feinberg, Attorneys for Appellant, Office and P. O. Address, Savings Bank Bldg., Ithaca, N. Y. Let the writ issue as prayed. Washington, D. C., March 22, 1915. Charles E. Hughes, Associate Justice of the Supreme Court of the United States. Cortland County, Clerk's Office. Filed Jul- 1, 1915, at — o'clock — m. E. S. Dalton, Clerk.

147 UNITED STATES OF AMERICA, *ss:*

To James H. Barlow, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York wherein Lehigh Valley Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this seventh day of June, in the year of our Lord one thousand nine hundred and fifteen.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

148 On this 21st day of June, in the year of our Lord one thousand nine hundred and fifteen, personally appeared before me, the subscriber, Riley H. Heath, and makes oath that he this day delivered a true copy of the within citation to Clayton R. Lusk, one of the members of the firm of Davis & Lusk, attorneys for James H. Barlow within mentioned at Ithaca, N. Y.

Sworn to and subscribed the 21st day of June, A. D. 1915.

J. M. QUILL,
Notary Public.

[Seal J. M. Quill, Notary Public, Tompkins County, N. Y.]

Cortland County. Clerk's Office. Filed Jul- 1, 1915, at — o'clock — m. E. S. Dalton, Clerk.

149 Copy.

American Surety Company of New York.

Capital and Surplus Over $6,000,000.

Company's Office Building, 100 Broadway, New York.

Know all men by these presents, that we, Lehigh Valley Railroad Company, as principal and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York and having an office and principal place of business at No. 100 Broadway, New York, N. Y., as surety, are held and firmly bound unto James H. Barlow in the full and just sum of Nine Thousand ($9,000.00) Dollars, to be paid to the said James H. Barlow, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 25th day of May, 1915.

Whereas, lately at a term of the Court of Appeals of the State of New York in a suit depending in said Court, between James H. Barlow, Plaintiff-Respondent, vs. Lehigh Valley Railroad Company, Defendant-Appellant, a judgment of affirmance was rendered against the said Lehigh Valley Railroad Company and remittitur returned and said judgment made that of the Supreme Court and the said Lehigh Valley Railroad Company having obtained writ of error and filed a copy thereof in the Clerk's Office of the said Supreme Court to reverse the judgment in the aforesaid suit, and a citation directed to the said James H. Barlow citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, therefore, the condition of the above obligation is such, that if the said Lehigh Valley Railroad Company shall prosecute said writ to effect, and answer all damages and costs if it fail to make its plea good, then this obligation to be void; else to remain in full force and virtue.

[Lehigh Valley Seal.]

LEHIGH VALLEY RAILROAD COMPANY,
By L. D. SMITH,
Vice-President.

Attest:
E. A. ALBRIGHT,
Assistant Secretary.

[American Surety Co. Seal.]

AMERICAN SURETY COMPANY OF NEW YORK,
By A. BRADLEY FULLER,
Resident Vice-President.

Attest:
E. A. FAHEY,
Resident Assistant Secretary.

Sealed and delivered in presence of:
——— ———.
——— ———.
——— ———.

Approved by
CHARLES E. HUGHES,
Associate Justice of the Supreme Court, U. S.

150 STATE OF NEW YORK,
County of New York, ss:

On the 3rd day of June, in the year 1915, before me personally came E. A. Albright to me known, who, being by me duly sworn, did depose and say that he resides in the Borough of Roselle and State of New Jersey; that he is the Assistant Secretary of the Lehigh Valley R. R. Co., the Corporation described in and which executed the above instrument; that he knows the seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order.

[NOTARY SEAL.] WILLIAM F. GLEESON,
Notary Public, Kings Co., No. 72; Certificate Filed in N. Y. Co., No. 92; New York Register, No. 6187.

Commission Expires March 30, 1916.

151 STATE OF NEW YORK,
County of Onondaga,
City of Syracuse, ss:

On this 25th day of May, 1915, before me personally appeared A. Bradley Fuller, Resident Vice-President of the American Surety Company of New York, with whom I am personally acquainted, who being by me duly sworn, said: That he resided in the City of Syracuse, N. Y.; that he is the Resident Vice-President of the American Surety Company of New York, the corporation described in and which executed the within instrument; that he knew the corporate seal of said Company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the Board of Trustees of said Company; that he signed said instrument as Resident Vice-President of said Company by like authority, and that the liabilities of the American Surety Company of New York do not exceed the assets as ascertained in the manner provided by law. And the said A. Bradley Fuller further said that he was acquainted with

E. A. Fahey, and knew her to be the Resident Assistant Secretary of said Company; that the signature of said E. A. Fahey was thereto subscribed by like order of the said Board of Trustees, and in the presence of him the said Resident Vice-President.

[L. S.] (Sgd.) GERTRUDE MACDONALD,
Notary Public, Onondaga County.

Certificate filed in Tompkins County.

STATE OF NEW YORK,
County of New York, ss:

H. M. Goff, being duly sworn, says: That he is an Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

(Sgd.) H. M. GOFF.

Subscribed and sworn before me this 3rd day of May, 1915.

[L. S.] (Sgd.) J. P. BREARTON,
Notary Public, New York County, No. 335;
New York Co. Register's No. 7093.

Commission Expires March 30, 1917.

American Surety Company of New York.

Incorporated April 14, 1884.

General Offices, 100 Broadway.

Company's Office Building, 100 Broadway, N. Y.

Financial Statement, March 31, 1915.

Resources.

Real Estate (Home Office Building and Land, unencumbered, $3,000,000.00; N. Y. City Water Front, unencumbered, 166,047.91)	$3,166,047.91	
Stocks and Bonds, Market Value, March 31, 1915	3,854,701.34	
Mortgage and Collateral Loans and Accounts Receivable	111,405.95	
Cash in Banks and Offices	817,099.57	
Premiums in Course of Collection (within 3 months, $558,190.58; over 3 months, 375,453.57)	933,644.15	
Accrued Interest and Rents	43,916.12	
Salvage Recoverable	218,601.04	
		$9,145,416.08

Liabilities.

Capital Stock	$5,000,000.00	
Surplus	696,430.47	
Reserve for Re-Insurance	2,147,830.95	
Reserve for Contingent Claims	909,187.27	
Reserve for Uncollectible Premiums	100,000.00	
Reserve for Expenses and Taxes	175,552.26	
Reinsurances and Accounts Payable, not due	70,335.62	
Premiums Paid in Advance	46,079.51	
		$9,145,416.08

In determining the financial condition of the Company, the Insurance Department adds $248,952.09 to the value of Real Estate stated above, bringing it to the Department's recent appraisal of $3,415,000.00; and deducts Premiums more than three months old, $375,453.57, less $100,000.00 carried by the Company as a Reserve for Uncollectible Premiums. It may also deduct some amount on account of deposits made in various jurisdictions to enable the Company to qualify for the transaction of business therein.

152 STATE OF NEW YORK,
Cortland County Clerk's Office, ss:

I, Edward S. Dalton, Clerk of said County, and of the Supreme and County Courts therein, the same being Courts of Record, Do Hereby Certify that I have compared the foregoing with the original now on file in said office, and that it is a correct transcript therefrom and of the whole of said original bond together with endorsements thereon.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Courts, at the City of Cortland, this 2nd day of July, 1915.

[Seal Cortland County.]

E. S. DALTON, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 7/2/15. E. S. D.]

153 Form G 337.

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The First meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 19, 1915, at eleven o'clock a. m.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"Gentlemen: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 8, 1914, for the purpose of nominating * * * officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * *

Place.	Resident Vice Presidents.	Resident Assistant Secretaries.
Syracuse, N. Y.....	Fredk. W. Barker.....	Lieber E. Whittic.
	Charles W. Andrews..	A. Bradley Fuller.
	Lieber E. Whittic.....	E. A. Fahey.
	A. Bradley Fuller.....	Edward J. Walsh.
	Edward J. Welsh	

* * * * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the Members of the Executive

Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

* * * * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, W. H. Riley, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 29th day of January, 1915.

[American Surety Seal.]

(Sgd.) W. H. RILEY,
Assistant Secretary.

[Endorsed:] Cortland County, Clerk's Office. Filed July 1st, 1915, at — o'clock — m. E. S. Dalton, Clerk.

154 STATE OF NEW YORK:

Supreme Court, Cortland County.

In Law.

JAMES H. BARLOW, Plaintiff-Respondent,
against
LEHIGH VALLEY RAILROAD COMPANY, Defendant-Appellant.

Now comes the defendant in the above entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause:

I. That the Court of Appeals of the State of New York erred in affirming Judgment of the Supreme Court of the State of New York, for the reason that the record in this proceeding clearly shows that the work which was being performed at the time of the accident and injury to the plaintiff was in no way a part of interstate commerce, and the trial court, therefore, erred in submitting the case to the jury under the Federal Employers' Liability Act instead of directing a Judgment for the defendant pursuant to the Laws of the State of New York.

Wherefore, appellant prays that the Decree be reversed and that said Supreme Court of the State of New York be ordered to enter a Decree reversing the decision in said cause.

COBB, COBB, McALLISTER & FEINBERG,
Attorneys for Appellant.

Office and P. O. Address, Savings Bank Bldg., Ithaca, N. Y.

155 [Endorsed:] State of New York. Supreme Court Cortland County. James H. Barlow, Plaintiff-Respondent, against Lehigh Valley Railroad Company, Defendant-Appellant. Assignment of Errors. Original. Cobb, Cobb, McAllister & Feinberg, Attorneys for Appellant. Office and P. O. Address, Savings Bank Bldg., Ithaca, N. Y. Cortland County, Clerk's Office. Filed Jul- 1, 1915, at — o'clock — m. E. S. Dalton, Clerk.

156 Court of Appeals.

JAMES H. BARLOW, Respondent,
v.
LEHIGH VALLEY R. R. Co., Appellant.

(Decided February 5, 1915.)

Appeal from a Judgment of Appellate Division Affirming a Judgment of Trial Term Entered upon a Verdict of a Jury in Favor of Plaintiff.

Peter F. McAllister for Appellant.
Clayton R. Lusk for respondent.

MILLER, *J.*:

The only question which survives the unanimous affirmance by the Appellate Division is that presented by the exception to the submission of the case to the jury under the Federal Employers' Liability Act (35 Stat. 65, c. 149, as amended by 36 Stat. 291, c. 143). The plaintiff was employed by the defendant, an interstate and intrastate carrier, as an engineer on a switch engine at its yards in Cortland, N. Y. At the time of, or just before, the accident his crew were, or had been, engaged in placing three cars of supply coal upon a trestle where the coal was to be dumped into pockets, from which it was to be taken indiscriminately to coal engines employed in interstate or intrastate commerce. The three cars of coal had been transported over the defendant's own road from Sayre, Pa., to Cortland and had arrived at the Cortland yards and been placed on sidings at different times a few days before they were placed on the trestle. The plaintiff was reaching under the engine to examine a brake beam, which was down, when the fireman, who had taken his place in the cab, suddenly backed the engine and inflicted the injuries for which the plaintiff has
157 recovered. That movement of the engine was either to uncouple it from the cars or to back it down the incline just after it had been uncoupled.

The plaintiff's right to recover under the Federal act is maintained on two grounds; 1, that the transportation of the coal from Sayre, Pa., though for the defendant's own use, was interstate commerce and was not completed until the cars were actually placed on the trestle to be unloaded; 2, that the act of placing the cars on the trestle, so that the coal could be dumped into pockets from which it could be transferred to the tenders of engines engaged in interstate commerce was so closely connected with and related to interstate commerce as to be a part of it. We think the action may be sustained upon both theories.

Transportation, if not strictly commerce, is at least the particular part of commerce in which the defendant is engaged and which

said act was intended to regulate. It is not practical in determining the application of the Federal or the state law to distinguish between the transportation of supplies from one state to another for the carrier's own use and the transportation of merchandise for sale or exchange. Enough difficulties from conflicting laws and authorities in the case of carriers engaged in both interstate and intrastate commerce now exist without unnecessarily creating others. Congress has undertaken to regulate the liability of carriers to their employees while engaged in interstate commerce, and modern conditions require that all interstate transportation be regarded as commerce or an agency of commerce, subject to the Federal Statute and under the supervision of the Federal authorities. (See Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1. It has been held that the hauling of empty cars from one state to another is interstate commerce. (See Nor. Car. R. R. Co. v. Zachary, 232 U. S. 248, 259). Certainly, then, the hauling of cars loaded with supplies for the carrier's own use is commerce within the
158 meaning of the act and subject to the jurisdiction of Congress.

The transportation was not completed until the cars reached their destination, the trestle where they were to be unloaded. The interstate transportation was interrupted, but not terminated, when the cars were put on the siding in the Cortland yards. The case in that aspect is precisely the same as though that interruption had occured at some other point in the route. Work in a yard such as switching interstate cars, taking their numbers or preparing an engine to move interstate freight is a part of interstate commerce. (Johnson v. Southern Pacific Co., 196 U. S. 1, 21; McNeill v. Southern Railway Co., 202 U. S. 543: St. L., San Francisco & Texas Railway Co., v. Seale, 229 U. S. 156: Nor. Car. R. R. Co. v. Zachary, supra.)

If the plaintiff had actually been coaling an engine preparatory to its moving interstate cars, he would plainly have been engaged in interstate commerce. (Nor. Car. R. R. Co. v. Zachary, supra.) The placing of the coal cars on the trestle was one step removed from such work, but it was certainly no more remote than the carrying of bolts to repair a bridge, which was held to be so closely connected with interstate commerce as to be a part of it. (Pederson v. Del., Lack. & West. R. R. Co., 229 U. S. 146.) We think, as the learned Appellate Division thought, that that case is decisive on the point. The appellant argues that the doctrine of that case was limited by the later decision of the United States Supreme Court in Illinois Central Railroad Company v. Behrens (233 U. S. 473). We do not construe the later decision as in any way limiting or modifying the rule of the Pederson case. In the Behrens case the injured employee was engaged on a switch engine moving cars loaded with intrastate freight from one point in a city to another point in the same city. The two cases illustrate how different rules may
159 apply to precisely the same kind of work for the same employer, depending on whether the particular service at the

moment is a part of interstate, or intrastate, commerce. It was decided in the Behrens case that, notwithstanding the undoubted power of Congress to extend the application of the Employers' Liability Act, it had as yet confined it to "injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce." The employee in that case was concededly engaged at the moment of his injury in intrastate commerce. Mr. Justice Van Devanter said: "That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury." (p. 478.) That quotation is apposite to the final point of the appellant, that, even if the placing of the cars on the trestle was a service in interstate commerce, that service had been performed when the accident occurred.

I shall assume, although the evidence would justify a different finding, that the act of uncoupling the car from the engine had been completed and that the fireman had started to back the engine down the incline from the trestle when the accident occurred. Still the particular service in interstate commerce was not completed. The rule governing the case could not be changed by the mental determination of some one in authority to put the crew at intrastate work upon the return of the engine to the yard. The case in that aspect is the converse of the Behrens case. It is an anomalous situation, and one to be remedied, as far as possible by legislation, that an employer's liability to his employee may be governed by one rule at one moment and by an entirely different rule at the next, though the employee is all the time engaged in precisely the same kind of work. We are not disposed to increase the
160 difficulty by drawing nice distinctions. While returning from the performance of a particular service in interstate commerce the employee should be regarded as still engaged in that service. (See San Pedro, L. A. & S. L. R. Co. v. Davide, 210 Fed. Rep. 870; Nor. Car. R. R. v. Zachary, supra.)

The judgment should be affirmed, with costs.

Willard Bartlett, Ch. J., Hiscock, Chase, Cuddeback, Cardoza and Seabury, JJ., concur.

Judgment affirmed.

[Endorsed:] Cortland County Clerk's Office. Filed Jul- 1, 1915, at — o'clock — m. E. S. Dalton, Clerk.

161 The Supreme Court of the State of New York, Cortland County.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff-in-Error,
against
JAMES H. BARLOW, Defendant-in-Error.

STATE OF NEW YORK,
Cortland County Clerk's Office, ss:

To the Supreme Court of the United States:

I, E. S. Dalton, Clerk of the County of Cortland, and of the Supreme Court of the State of New York therein, the same being a court of record, do hereby certify, that the foregoing are the original Writ of Error allowed in the above entitled action by Associate Justice, Charles E. Hughes, of the Supreme Court of the United States; Petition for such Writ; order for such writ to issue, Citation thereon with proof of service; assignment of errors; copy of the opinion of the Court of Appeals of New York State; certified transcript of the record in the above entitled cause; and copy of bond; which original papers were filed in my office with the original Writ of Error herein, and are hereby returned to the Supreme Court of the United States with a certified Transcript of the record, in obedience to the command of such Writ.

In witness whereof, I have hereunto set my hand and affixed the seal of my office, this 2nd day of July A. D. 1915.

[Seal Cortland County.]

E. S. DALTON, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 7/2/15. E. S. D.]

162 Supreme Court of the United States.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff-in-Error,
against
JAMES H. BARLOW, Defendant-in-Error.

It is hereby stipulated by and between the respective attorneys in the above entitled action pursuant to Rule 8 of the Rules of the Supreme Court, that it is conceded that this action was brought by the plaintiff for injuries received while he was in the employ of the Lehigh Valley Railroad Company as engineer of a switch engine working in defendant's yards at Cortland, New York; that at the time the accident happened plaintiff had, pursuant to a rule

of the defendant, exchanged places with his fireman whose name was Truman, and after the engine had pushed some cars of supply coal for the defendant upon a tressle preparatory to dumping this coal into coal pockets, plaintiff got down off the engine to examine a brake hanger to which his attention had been called, when a fireman pursuant to a signal of the conductor of the yard crew, moved the engine thus injuring the plaintiff.

The Court submitted the case to the Jury under the Federal Employers' Liability Act on the question of defendant's negligence, plaintiff's freedom from contributory negligence, and the extent of damages, and it is conceded for the purposes of this appeal only, that there was a question of fact as to each of these questions; that

for the purposes of this appeal in determining whether the
163 case was properly submitted to the Jury under the Federal Employers' Liability Act, that part of the record which shall be printed is contained in Fols. 15-50 inclusive, which includes the Complaint and Answer; Fols. 62-65, inclusive, and that sentence in Fol. 67 which reads as follows, "After they had gotten up the incline there on the level place, these cars rested until they were afterward unloaded," which includes part of the testimony of Leland Dane for the plaintiff (upon cross examination); Fols. 91-92 which includes part of the testimony of Layton H. Cole beginning in that part of Fol. 91 which reads as follows: "When the engine started back," etc. and continuing in Fol. 92 down to the sentence beginning, "When the engine ran over his leg"; Fols. 125-131 inclusive, which includes part of the testimony of James H. Barlow, plaintiff; Fols. 131-159 inclusive, which includes the testimony of Charles N. Page; Fols. 193-195, inclusive being evidence of James H. Barlow; Fols. 321-331 inclusive, which includes defendant's motion for a non-suit, etc.; that part of Fol. 344 which reads, "I was on the engine at the time it went up on to the tressel"; that part of Fol. 357 which begins, "When Mr. Barlow was under the engine" etc., and continuing to the end of the Folio, being the evidence of Claude J. Valentine; that part of Fol. 359 which reads, "When this engine got to the top and the cars were on the level, it stopped a very short time. In moving either way the cars were in their proper place. The next business the engine had was to back down and do some other work. It did remain there a very short time after the cars were put up," being the testimony on

cross examination, of Valentine for the defendant; the testi-
164 mony of Clayton Truman for the defendant included in Fols. 374-379 inclusive; Fols. 441-446 inclusive, which includes the defendant's motion for the direction of verdict, etc.; Fols. 447-472, inclusive, which includes the trial court's charge; Fols. 481-485, inclusive, which includes Exhibit (A); Fols. 502-525 inclusive which includes opinion of Appellate Division; the opinion of the Court of Appeals and the Assignment of Error annexed hereto, together with the Remittitur of the Court of Appeals of the State of New York be forwarded by the Clerk of the Court in which the record in this case is filed, to the Clerk

of the Supreme Court of the United States, pursuant to the Writ of Error to that Court.

COBB, COBB, McALLISTER & FEINBERG,
Attorneys for Plaintiff-in-Error.
DAVIS & LUSK,
Attorneys for Defendant-in-Error.

[Endorsed:] Cortland County Clerk's Office. Filed — Apr. 30, 1915 at — o'clock — M. E. S. Dalton, Clerk.

Endorsed on cover: File No. 24,843. New York Supreme Court. Term No. 194. Lehigh Valley Railroad Company, plaintiff in error, vs. James H. Barlow. Filed July 13th, 1915. File No. 24,843.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

NO. 194

LEHIGH VALLEY RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JAMES H. BARLOW,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

REPLY BRIEF OF PLAINTIFF IN ERROR

STATEMENT

As in our Direct Brief, plaintiff in error herein is referred to as defendant, and defendant in error as plaintiff.

Because of the fact that defendant's position has been misrepresented in the plaintiff's brief in this Court, defendant deems it necessary to file a reply brief pointing out the proper answer to the mis-statements in plaintiff's brief.

Much of the plaintiff's brief consists of bald statements that upon the trial of this action defendant did not raise any question as to the nature of the work performed by plaintiff at the time he was injured: In other words, that defendant did not squarely raise

the question as to whether or not plaintiff was at that time engaged in an act of interstate commerce and also whether defendant at such time was engaged in an interstate act. Plaintiff endeavors in his brief to put defendant in the position of having claimed upon the trial, first, that defendant was not engaged in interstate commerce at the time of the accident because the coal being handled at the time was supply coal and had been brought into the State of New York for supplying defendant's interstate and intrastate engines with fuel, and, secondly, because the coal being transported was intended for intrastate engines as well as interstate engines.

Plaintiff is correct in the latter part of his statement in the brief that defendant claimed that the fact that the coal was intended for use in interstate engines as well as intrastate engines, was not decisive as to the character of the commerce, if any, in which the Railroad Company was engaged at the time of the injury. This feature of the case, as now admitted by plaintiff, was entirely disposed of by the decision of this Court in the case of Harrington v. Chicago, Burlington & Quincy Railway Company, 241 U. S. 177, as discussed in defendant's direct brief herein.

Up to the time of the service of defendant's direct brief in this Court upon counsel for plaintiff, no question had ever been raised throughout the trial and the several appeals in the State Courts, that defendant did not claim that at the time of the accident plaintiff was not engaged in interstate commerce, because the trip from Sayre, Pa., to Cortland, N. Y., if an act of interstate commerce at all, had been completed when the cars were placed on the siding in the Cortland yard. It is true there is no specific mention of the end of the interstate journey in defendant's motion for nonsuit at the close of plaintiff's evidence

and the renewal of the motion for nonsuit and motion for direction of verdict at the close of all the evidence. Defendant's motion was, among other things, based upon the claim that the plaintiff's cause of action did not come within the Federal Employers Liability Act, "On the ground that the proof in this case is not sufficient to warrant a recovery thereunder." (Fols. 82-85, Fol. 111 and Fol. 118.)

Under the Federal statute the law is well settled that at the time of the injury plaintiff and defendant must be engaged in interstate commerce. The application of the Federal statute is well and clearly defined. Upon the motion for nonsuit at the close of plaintiff's testimony and at the end of the case, there was a full and complete discussion upon the part of counsel for defendant, participated in by counsel for plaintiff, as to the nature of the act in which plaintiff was engaged at the time of the injury. Not only was the question discussed as to whether the transfer of coal from Sayre to Cortland in defendant's own cars was interstate commerce in itself, but further, it was urged by the defendant that if such act be held to be interstate commerce, nevertheless the placing of the coal cars upon the siding at Cortland had ended the interstate character of the transaction, and that the transfer of the coal from the siding to the coal pockets some three weeks after the cars had been placed upon the siding was a new and independent act of intrastate commerce. Upon appeal to the Appellate Division of the Supreme Court defendant upon page 23 of its brief set forth its position in respect to the nature of the transaction as follows:

"THE RAILROAD AT THE TIME OF THE INJURY WAS NOT ENGAGED IN INTERSTATE COMMERCE.'

Three reasons are assigned for this answer:

"1. In transporting its own supply coal from Pennsylvania to New York, over its own road, for its own use in its own engines, it was not engaged in interstate commerce."

"2. Even if we concede that such transportation from Pennsylvania to New York was interstate commerce, such interstate commerce consisting in the transportation of supply coal from Pennsylvania to New York had ceased at the time of the accident in question."

"3. In transporting supply coal from one part of the defendant's yards to another part the defendant was not engaged in commerce at all."

"Each of these reasons will now be argued in detail.

I. *In transporting its own supply coal from Pennsylvania to New York, over its own road for use in its own engines, it was not engaged in interstate commerce.*

* * * * * * * * *

"II. *Even if we concede that such transportation from Pennsylvania to New York was interstate commerce, such interstate commerce, consisting in the transportation of supply coal from Pennsylvania to New York, had ceased at the time of the accident in question.*"

"Under the stipulation signed by the attorneys for both parties it was conceded that one of the cars containing supply coal in question arrived in the Cortland yard on July 3rd, 1912, and that the other two arrived on July 10th, 1912. The accident, as a result of which suit is brought, occurred on July 27th, 1912. During the three weeks which elapsed between the arrival of the coal at Cortland and the accident nothing whatever was done in reference to the three cars con-

taining the coal. When shipped from Sayre to Cortland they were destined for the Cortland yards and they had arrived at their destination by July 10th. If you concede, for the sake of agrument, that in transporting the coal from Sayre to Cortland the defendant was engaged in interstate commerce, must you not necessarily hold that that commerce ceased when the cars reached their destination in the Cortland yards? When they were moved from the siding to the trestle on July 27th a new act of commerce commenced, if we concede that the defendant's carriage of this coal was commerce at all."

"The accident itself occurred when the coal was on the trestle just prior to being dumped into the pocket. At the time of the accident and under the Pederson case this is the time we must consider. The transportation from Sayre to New York was three weeks distant; and the only transportation involved is that from the siding to the trestle. This seems to Appellant to be the common sense holding and it is also supported by authority."

"Moreover, defendant discussed in the Appellate Division brief as bearing on the point at issue the case of Pearson v. N. Y. S. & C. Railroad Company, 85 Atlantic 233, 83 N. J. Law 661. In that case the defendant railroad company was engaged in replacing rails on its tracks in New Jersey. The rails had been brought from Buffalo, N. Y., and had remained at Beaver Lake, N. J., near which place they were to be used, for three or four days after their arrival. While being lifted out of the car in which they were contained plaintiff, who was assisting in that work, was injured. The Pederson case was quoted approvingly as to the final test being the relation of the employee's work to interstate transportation at the time of the injury. It was held that whether the transportation

from New York to New Jersey was or was not interstate commerce, whatever of an interstate character was attached to the shipment ceased when they reached their destination, and in transporting the rails from Beaver Lake to the place where they were to be used the company was not engaged in interstate commerce but in intrastate commerce; if indeed, says the Court, it was engaged in commerce at all. It might be said at that time to be preparing for engaging in commerce. The Court held the act inapplicable and refused to permit a recovery under the Federal Statute. This case was decided by the highest New Jersey Court. Again in its Appellate Division brief at page 28, defendant says:"

"III. *In transporting supply coal from one part of the defendant's yards to another part the defendant was not engaged in interstate commerce at all.*"

"It is the contention of the defendant that whether you decide the transportation of the coal from Sayre to Cortland was interstate commerce or not, that you must necessarily decide that the interstate shipment from Sayre to Cortland ceased upon the arrival of the coal at Cortland on July 3rd and July 10th; and that the character of the transportation on July 27th from the siding to the trestle must be determined without reference to the character of the shipment from Sayre to Cortland. It is contended that this is the only part of the transportation to be considered, that from the siding to the trestle. There are several cases in the courts of other states on similar facts in which it has been decided that such a transportation was not interstate commerce and that it was not commerce at all."

"The case most similar in facts is Mo., K. & T. Railroad vs. Fessmire, a Texas case decided in 1912, and reported in 150 Southwestern at page 201. The

plaintiff, Fessmire, was brakeman upon defendant's water train. The water train carried water to be used in the defendant's engines. The train was loaded with water at Honey Springs, in Dallas County, Texas, carried to the place where plaintiff was injured, where it was unloaded and subsequently dumped into a tank. Fessmire was killed by the explosion of the engine. In the Fessmire case, as in the Barlow case, the proof failed to disclose whether the water was afterwards actually used by interstate engines. The Court denied the plaintiff the benefit of the Federal Act, its language being as follows: 'It occurs to us that Fessmire was essentially not engaged in interstate commerce. The duties he was performing are inconsistent with the primary meaning of the term. What he did served no interstate traveller or shipper * * * * * * * if it be decided that the water he was helping haul might ultimately be used by some train passing that point. Yet the proof shows that yet another employee must pump the water into the elevated tank before it could be used by any passing train. If this be interstate traffic what then is intrastate traffic ? When the train crew loaded the water on the cars at Honey Springs and unloaded it in Rockwell County, their duty was fulfilled, yet as unloaded no train could use the water until it was by some process pumped into the elevated tank and from thence into a passing engine, and since the record fails to sustain the claim that the water was to be used for interstate commerce and because in our opinion even though the water so hauled might at some time be used by a train so engaged, it would not in law be deduced therefrom that Fessmire was employed by a train engaged in any sense in such commerce. We conclude that the assignment of error is not sound'."

Plaintiff in Point IV. of his Appellate Division brief also discusses this phase of the question and among other things says:

"The appellant's counsel make a strained and technical argument to show that the railroad at the time of the injury was not engaged in interstate commerce; that if in moving the cars from Sayre to Cortland the railroad was so engaged, the transportation had ceased before the switching was done and that that was merely a local movement; that plaintiff was not at the time of the injury employed in interstate commerce nor had any substantial part in effecting interstate transportation at the time of his injury."

At the oral argument in the Appellate Division the question was discussed at some length and in the opinion of the Court written by *Lyon, J.*, Fol. 131 of this report, the Court says:

"The respondent contends that at the time of receiving the injuries he was employed in interstate commerce in *two senses;* (Italics ours); that he was engaged in the work of delivering upon the coal trestle coal which had been shipped from Sayre for that purpose, the delivery of which had been temporarily suspended during the time the car had remained upon the siding, and that he was engaged in delivering coal to be necessarily used in part by locomotives employed in hauling trains engaged in interstate commerce."

Again, in defendant's brief in the Court of Appeals we find the same question taken up on pages 15, 16 and 17 substantially as set forth in defendant's brief in the Appellate Division, including a discussion of the case of Pearson v. N. Y. S. & C. Railway Company, supra. In plaintiff's answering points in the Court of Appeals at page 17 he says among other things:

"Appellant contends that the plaintiff was not engaged in interstate commerce at the time he was injured and in that connection argues that the shipment of coal from Sayre, Pa., to defendant's trestle in the City of Cortland, N. Y., was completed when the cars in question reached the tracks of defendant in its yard in the City of Cortland."

The point was later orally argued before the New York Court of Appeals. In the decision handed down by Judge Miller he said at Folio 157 of this record:

"The plaintiff's right to recover under the Federal Act is maintained on two grounds;—one, that the transportation of the coal from Sayre, Pa., although for the defendant's own use, was interstate commerce and *was not completed until the cars were actually placed on the trestle to be unloaded:* (Italics ours.) second, that the act of placing the cars on the trestle so that the coal could be dumped into pockets from which it could be transferred to the tenders of engines engaged in interstate commerce was so closely connected with and related to interstate commerce as to be a part of it. * * * * * * The transportation was not completed until the cars reached their destination, the trestle where they were to be unloaded. The interstate transportation was interrupted but not terminated when the cars were put on the siding in the Cortland yards. The case in that aspect is precisely the same as though that interruption had occurred at some other point in the route."

The situation, therefore, resolves itself into this. There is nothing before this Court except the mere statements of plaintiff's counsel repeated a number of times throughout the brief, asserting that defendant did not at the trial of the case claim that the interstate commerce act, if any, had been completed when the coal cars in question had been placed on defendant's

siding in Cortland. As against this bare statement of counsel we have defendant's motion for dismissal of plaintiff's complaint on the ground that the Federal Statute did not apply, and a proper exception to the charge of the Court wherein the case was submitted under the Federal Statute. Upon this phase of the dispute we quote again Judge Lyon in his opinion in the Appellate Division, Folio 129 of this record:

"The defendant duly excepted to the submission of the case to the jury under the Federal Statute and the validity of such exception furnished a serious question for consideration upon this appeal from the judgment entered upon a verdict in favor of the plaintiff."

Later in the Court of Appeals, Judge Miller at Folio 156, said: "The only question which survives the unanimous affirmance by the Appellate Division is that presented by the exception to the submission of the case to the jury under the Federal Employers' Liability Act."

As counsel for defendant we positively affirm that the point involved was fully discussed in the trial court upon the motion for nonsuit at the close of plaintiff's evidence and at the end of the case and there was no misunderstanding whatever upon the part of counsel or upon the part of the Court as to the attitude of defendant in this regard. Certainly after examining the briefs of defendant both at the Appellate Division and the Court of Appeals as quoted above, and the answering briefs of plaintiff in those courts, as well as the portions of the Appellate Courts' opinions also quoted, it cannot be denied that defendant at all times claimed that the movement of the coal from the siding in the Cortland yard to the coal pocket

at the time the accident happened was not interstate in character; in other words, that the interstate movement, if any, had ceased when the coal was placed upon the siding some weeks previously.

Judge Lyon at the Appellate Division, Folio 127, said: "The material facts are undisputed." Plaintiff cites in its brief the case of Louisville & Nashville R. R. Company v. Parker, 242 U. S. 4, a case recently decided by this Court, in which it was held that a railroad employee working on a switch engine in a railroad yard was engaged in an act of interstate commerce while switching an empty car in the yard. In that case there was evidence by some witness upon the part of the railroad company that the act of switching the empty car at the moment of the injury was for the purpose of reaching a car of interstate freight and the Court held that such purpose controlled and gave the movement of the empty car an interstate character. The judgment, however, was affirmed notwithstanding the view of the Court as to the interstate act because the Court took the ground that the evidence given by the railroad company's witness in respect to the purpose for which the empty car was being moved may not have been believed by the jury and therefore a request should have been made to submit the question to the jury, and since the motion was not specific the railroad company could not take advantage of the Federal Statute. In other words, in the Parker case the facts were disputed. In the instant case, however, as well stated by Judge Lyon, the facts as to the nature of the commerce movement, if any, are fortunately not in dispute. They are in fact, so far as the question of interstate commerce is concerned, absolutely controlled by a stipulation suggested by the plaintiff and agreed to by defendant at the time of the trial. (Folios1 21-125. Exhibit "A".) Therein it is set forth that the cars of coal in question "were

shipped out of and billed out of Sayre, Pa., to Cortland, N. Y., upon a way-card issued at Sayre, Pa., and came by defendant's road where they were placed upon switches and sidings and there remained until they were placed upon the coal trestle on the 27th day of July, 1912." It is further set forth in said stipulation that one car was received in the Cortland yard July 3rd, 1912, and the other two cars, July 10th, 1912. We had, therefore, at the time of the trial, the undisputed facts that these three cars came from Sayre, Pa., arriving July 3rd and July 10th, 1912; that they were placed upon the defendant's siding where they remained until July 27th, 1912 upon which date they were taken by defendant's switching crew and were being moved upon the defendant's trestle at the time plaintiff was injured. There was no dispute, therefore, or no evidence of witnesses from which different inference might be drawn. In other words, there was nothing whatever for a jury to decide as to when the cars arrived at the siding or when they were taken to the coal trestle, or the purpose of the movement to the coal pocket. The stipulation referred to, prepared by plaintiff's counsel and agreed to by defendant's counsel, left nothing whatever for the consideration of a jury in this respect.

The sole question was, did the interstate movement, if such it was, from Sayre, Pa., to Cortland, N. Y., cease on July 3rd as to one car and July 10th as to the other two cars, or did that movement continue until July 27th, the date when the switching crew took those cars from the siding to the coal trestle.

It is submitted, therefore, that the Parker case referred to in plaintiff's brief, supra, has no application to the facts involved here.

Plaintiff's counsel labored vigorously on several pages of his brief in an effort to show that the defendant has adopted the expression "storage track" in order that defendant may come within the purview of the Harrington case, and to sustain his viewpoint plaintiff's counsel asserts that there was no storage track in defendant's yard at Cortland. It is true there is nothing in the evidence which shows any of defendant's tracks as bearing any particular label. It does appear that there are "switches" and "sidings" in defendant's yard at Cortland and to quote plaintiff's counsel's own words in the stipulation "Exhibit A" of the record, it was on one of these "switches and sidings" that the coal cars in question had been placed. According to the definition of "siding" in the "Standard Dictionary" that expression means a side-track and also a switch, and it is common understanding that side-tracks and switches are used by railroads for the storage of cars. The storage may be long or short but if defendant's cars are placed upon the siding for two and one-half weeks in one instance and three and one-half weeks in the other instance, can it be said in all reason that the cars so placed upon the siding are not in storage? The words "in storage" used to apply to cars left upon a siding as in the Harrington case, do not of course, have the signification that attaches to articles placed in a building commonly known as a store-house. The fact is that this coal, whatever the siding may properly be known in railroad parlance, was stored there for between two and one-half weeks and three and one-half weeks until the defendant, at its own convenience, had it taken to the coal pockets.

Suppose instead of having been standing upon the siding two or three weeks, the railroad company had left these cars there for two or three months or six months or more. Could it then be contended that the

coal was not "stored" upon this siding in the common railroad acceptation of that term, and if so, would the siding not properly be called a "storage track ?" Of course in some of the large cities where the railroads have extensive yards, there may be tracks particularly designated storage tracks and such may possibly have been the fact in Kansas City where the Harrington case arose. On the other hand, in a small city like Cortland the siding may have no particular designation. The determining feature, however, is not what the sidetrack may be called among the railroad men. It is, rather, the use to which this side-track may be put at a particular time. It is unimportant, therefore, from the standpoint of the defendant whether we term the track upon which these cars had been standing in the Cortland yards a "switch," a "siding," a "side-track," or a "storage track." The important point is that the railroad company had, upon the arrival of these cars from Sayre, placed them upon one of its tracks called in the stipulation a "siding" and had left or stored these cars on this siding until its own purposes required the use of the contents of the cars. Plaintiff's counsel may call this act "holding" the cars, "placing" the cars or may use any other term he chooses, but in the final analysis he must recognize the element of storage. The name is immaterial. It is the purpose that governs.

Again, plaintiff's counsel lays some stress upon what is called "ultimate destination" of the coal and makes a labored argument that such ultimate destination is defendant's coal pocket. Following the words of Judge Miller in the Court of Appeals, plaintiff says that the coal was intended for the coal pockets and therefore

the journey was simply interrupted during the time that the cars remained in the Cortland yard, and that the same situation would arise if the interruption had occurred at some intermediate point between Sayre and Cortland. As we have already pointed out in our direct brief, these cars were billed from Sayre to Cortland and they had arrived at Cortland. If the train that brought the coal from Sayre to Cortland was an interstate train, according to the plaintiff's argument the interstate character of the transaction continued until the coal reached the coal pocket, no matter how long a time the cars may have remained upon the siding or storage track in the Cortland yard, whether it be three weeks, three months or more. As well might the plaintiff claim that the "ultimate destination" of this coal was the fire box of defendant's engines because later on the coal was to be used in defendant's engines, or the ash heap in defendant's yard or along its right-of-way because the ashes from the coal might be disposed of in those places. Is it reasonable to say that within the meaning of the Federal Statute after the cars have been disconnected from the interstate train and placed upon a side-track where they remain for weeks or months and are later taken from the side-track by an entirely different crew engaged in yard switching and taken to the coal pockets, from the time the coal leaves Sayre until it reaches the coal pockets, it is one continuous journey? On the contrary, is it not reasonable to say that the interstate journey, if such it be, ceases when the cars are taken off the interstate train and placed on the side-track, and that a new and independent journey and act takes place when the cars are later transferred to the coal pockets? Such, we submit, is the ruling of this Court in the latest and most authoritative decision, the Harrington case more fully discussed and relied upon in our direct brief.

As Mr. Justice Hughes said in that case, "With the movement of the coal to the storage tracks, however, we are not concerned; that movement had long since ended * * * *."

Respectfully submitted,

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FILED
DEC 28 1916
JAMES D. MAHER
CLERK

BRIEF OF PLAINTIFF IN ERROR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 194

LEHIGH VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR

vs.

JAMES H. BARLOW

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

NO. 194

LEHIGH VALLEY RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JAMES H. BARLOW.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF OF PLAINTIFF IN ERROR

STATEMENT

This is a Writ of Error to the Supreme Court of the State of New York in favor of the Lehigh Valley Railroad Company, defendant in the Court below, and hereafter referred to as defendant, and against James H. Barlow, plaintiff in the Court below and hereafter referred to as the plaintiff, to review a decision by the Court of Appeals of the State of New York, being the highest Court of law or equity in said State. The question here involved and brought up for review by this Honorable Court is a question of the application of the Federal Employers' Liability Act.

This action was brought by the plaintiff, James H. Barlow, for injuries received while he was in the employ of the defendant as engineer of a switch engine working in defendant's yards at Cortland, New York. At the time the accident happened plaintiff had, pur-

suant to a rule of the defendant, exchanged places with his fireman and after the engine had pushed some cars of supply coal for the defendant upon a trestle preparatory to dumping this coal into coal pockets, plaintiff got down off the engine to examine a brake hanger when the fireman, pursuant to a signal, moved the engine back off the trestle, thus injuring the plaintiff. Fol. 162.

The Trial Court submitted the case to the jury under the Federal Employers' Liability Act on the question of defendant's negligence, plaintiff's freedom from contributory negligence and the extent of damages. Fols. 162-163.

The three cars of the defendant railroad company's supply coal which the plaintiff's crew had placed upon the trestle on the day of the accident, which occurred on the 27th day of July, 1912, were Lehigh Valley car No. 19402, Lehigh Valley car No. 49034 and Lehigh Valley car No. 54907. These cars had been brought from Sayre, Pennsylvania, to Cortland, New York, by the defendant railroad over its tracks and had been stored in the defendant railroad's yard at Cortland, New York, until placed upon the coal trestle on the day of the accident. Fol. 121.

Car No. 19402 was placed in the Cortland yards on July 3rd, 1912. Cars Nos. 49034 and 54907 were placed in the Cortland yards on July 10th, 1912. Fol. 121.

The aforementioned cars were all loaded with supply coal for defendant which coal was later used in coaling intrastate and interstate engines. Fols. 122-125.

On the day in question plaintiff's switching crew had taken the aforementioned cars of supply coal from the storage track in defendant's yard at Cort-

land and had pushed them onto the trestle over the coal pockets, and at the time plaintiff Barlow was injured the switch engine had been uncoupled from these cars of supply coal and was backing off from said trestle. Fols. 90-93-95-110.

The exceptions upon which the defendant relies will be found:

(1) In defendant's motion for a nonsuit at the close of the plaintiff's case as follows:

"Def't's. Counsel: I ask Your Honor to dismiss the Complaint as to any allegation therein which alleges, or tends to allege, any right to a cause of action under what is known as the Federal Employers' Liability Act, on the ground that the proof in this case is not sufficient to warrant a recovery thereunder.

"The Court: I am not prepared to say that the transportation of coal, as I have stated, from Sayre to Cortland, for uses of its own, is interstate commerce, but I think the evidence in this case required findings upon my part first that the coal that was on these three coal cars came from Pennsylvania in these three cars; second, that this coal belonged to the defendant and was being put upon this trestle and into these pockets for the use of the defendant in coaling or supplying its engines with coal. No doubt about that. Third, that it was intended by the defendant that the engines drawing its daily milk train from Cortland, New York, to Sayre, Pennsylvania, should be supplied with this coal which was being then put upon the trestle and that they afterwards did use the coal, or some portions of it, in coaling or supplying these engines with coal for hauling these milk trains.

"Ddf't's. Counsel: To that we take an exception, to the evidence of anything that occurred after this accident, and then, further, there is no actual proof

that these work engines or any of the freight engines were actually coaled out of these three cars. Now, 60 per cent of this coal was from flat cars. Now, we don't know as a fact that any of these engines were coaled from any of these three cars.

"The Court: Suppose I am required to make a finding on that subject, in all probability they did, and if I am required to make a finding one way or the other upon it, I think I would have to find that some of these engines drawing the milk train were coaled from this particular coal. I think the probability is that way, so if I am required to make a finding upon that, I should find that way.

"Def't's. Counsel: To that we except.

"The Court: And I think that those facts bring this plaintiff within the Federal Employers' Liability Act.

"Def't's. Counsel: To that we except.

"The Court: We will submit the case to the jury under the Federal Employers' Liability Act.

"Def't's. Counsel: Then do I understand the Employers' Liability Act in this state Your Honor holds does not apply ?

"The Court: I hold against you on that and give you an exception, but I shall submit the question to the jury mainly under the Federal Employers' Liability Act." (Fols. 81-85 inclusive.)

(2) Defendant's motion for a directed verdict at the close of the whole case. (Fols. 111-112 inclusive.)

(3) Defendant's exception after the Court's charge, (Fol. 118) where defendant's counsel says: "I except to Your Honor's submitting the question to the jury under the Federal Statute. The Court: Yes."

THE ERROR RELIED UPON

The error relied upon at this time is found in defendant's Assignment of Errors at Fol. 154: (1) That the Court of Appeals of the State of New York erred in affirming the Judgment of the Supreme Court of the State of New York, for the reason that the record in this proceeding clearly shows that the work which was being performed at the time of the accident and injury to the plaintiff was in no way a part of interstate commerce, and the Trial Court, therefore, erred in submitting the case to the jury under the Federal Employers' Liability Act.

BRIEF AND ARGUMENT

THE TRIAL COURT ERRED IN SUBMITTING THE CASE TO THE JURY UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

The Trial Court and the Appellate Courts below held that the Federal Employers' Liability Act applied to the case at bar for two reasons: (1) That the coal cars which were placed upon the coal trestle had been brought over defendant's railroad from Sayre, Pennsylvania, to Cortland, New York, and (2) that the coal in these cars was to be used in the future for intrastate and interstate engines. Fols. 82-85 inclusive, 127-136, 156-160 inclusive.

The position of the defendant upon the trial and upon the appeals herein has been that the Federal Employers' Liability Act did not apply to this case, for the reason that:

(1) The act of transporting the cars of coal from Sayre, Pennsylvania, to Cortland, New York, had ceased when the cars had been placed on the sidings in the Cortland yards from two and a half to over three weeks prior to the date of the accident.

(2) That the placing of cars of coal upon the trestle preparatory to the dumping of the coal into the coal pockets from which intra and interstate engines received their coal was not an act so closely related to interstate commerce as to be in name and in fact interstate commerce within the provision and meaning of the Federal Employers' Liability Act.

(3) That so far as concerned the movement of the supply coal contained in the cars that were placed upon the trestle by plaintiff's switching crew at the time of the accident, that movement had ceased when the cars were placed, and that since at the time of the accident the engine which ran over the plaintiff had been uncoupled from the cars of supply coal and was backing down the trestle away from said cars of supply coal, the engine was in no way furthering interstate commerce.

This Court has held that transportation of supply coal from one state to another ceases when said supply coal is placed on a siding and left there for at least a week before moving said coal to coal pockets. This Court has further held that the movement of supply coal from a siding to coal pockets from which inter and intrastate engines are supplied with coal is not an act so closely related to interstate commerce as to come within the provisions of the Federal Employers' Liability Act.

This decision was handed down on the 1st day of May, 1916, in the case of Chicago, Burlington & Quincy Railroad Company, Plaintiff in Error, against Margaret Harrington, reported in 241 U. S. 177, 36 Supreme Court Reporter 517, and absolutely disposes of the case at bar. Associate Justice Hughes wrote the opinion in that case. A month later Mr. Justice Hughes considered and granted defendant's applica-

tion for a Writ of Error. In the Harrington case the State Court related the facts as follows:

"The switching crew of which Harrington was a member did not work outside of this state, and was engaged, at the time of his death, in switching coal belonging to defendant, and which had been standing on a storage track for some time, to the coal shed, where it was to be placed in bins or chutes and supplied, as needed, to locomotives of all classes, some of which were engaged or about to be engaged in interstate and others in intrastate traffic. It may be conceded, as argued by defendant, that none of its locomotives or cars was set apart for service only in intrastate commerce. Defendant operated local trains from Kansas City to terminal points in this state which carried only intrastate commerce, but the locomotives and cars of such trains were subject to be diverted to other trains engaged in interstate commerce." (241 U. S. 178.)

Mr. Justice Hughes noted that "the plaintiff in error takes exception to the statement in part, asserting that there was no evidence that any of the locomotives which were supplied with fuel from the coal chutes, were engaged exclusively in intrastate commerce, or that any of the defendant's trains within the state were engaged exclusively in that commerce." But he added: "For the present purpose, we may assume the fact to be as stated by the plaintiff in error, and we may also assume, as it insists, that there was no evidence that the coal had been brought from mines within the State of Missouri or from mines owned by the plaintiff in error."

In deciding that Harrington was not engaged in work that was a part of interstate commerce within the meaning of the Federal Employers' Liability Act, Mr. Justice Hughes says:

"With the movement of the coal to the storage tracks, however, we are not concerned; that movement had long since ended, as it is admitted that the coal was owned by the company, and 'had been in storage in its storage tracks for a week or more prior to the time it was being switched into the coal chutes on the morning of the accident.' "

The Courts below have upheld the claim of the plaintiff in the case at bar that Barlow was engaged in interstate commerce, for the reason that the coal cars that had been placed upon the trestle just before the accident had come from Sayre, Pennsylvania, notwithstanding the fact that they had been standing on the storage tracks from two and a half to three and a half weeks prior to the happening of the accident.

It has always seemed to counsel for the defendant that while the defendant was engaged in transporting its own coal, in its own cars, over its own road, by its own employees, it was not engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act even if the movement was from one State to another.

But if the movement of the supply coal under such circumstances should be held to be interstate commerce within the meaning of the Federal Act, that movement ceased when the cars so transported were placed upon the Company's siding or storage track and the engine uncoupled. It is not a case where the railroad company transported coal from one state to another billed to a third party. In those circumstances it can properly be said that the nature of the transportation is interstate commerce and remains such up to the time the coal is actually delivered to the consignee.

This Court held in the case of Rhodes vs. Iowa, 170 U. S. 412, that a State Law forbidding the transportation of intoxicating liquors did not apply to a shipment from without the State until the merchandise was delivered "to the consignee at the point to which it was consigned." This Court, by Mr. Justice White said at pages 414, 420 and 426:

"The sole question presented for consideration is whether the statute of the State of Iowa can be held to apply to the box in question whilst it was in transit from its point of shipment, Dallas, Illinois, to its delivery to the consignee at the point to which it was consigned. That is to say, whether the law of the State of Iowa can be made to apply to a shipment from the State of Illinois, before the arrival and delivery of the merchandise, without causing the Iowa law to be repugnant to the Constitution of the United States.

* * * * * * *

"Did the act of Congress referred to operate to attach the legislation of the State of Iowa to the goods in question the moment they reached the state line, and before the completion of the act of transportation, by arriving at the point of consignment and the delivery there to the consignee is then the pivotal question?

* * * * * * *

"We think that interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the State to attach to an interstate commerce shipment, and until its arrival *at the point of destination and delivery there to the consignee*, and of course this conclusion renders it entirely unnecessary to consider whether if the act of Congress

had submitted the right to make interstate commerce shipments to state control it would be repugnant to the Constitution.

"It follows from this conclusion that as the act for which the plaintiff in error was convicted, and which consisted in moving the goods from the platform to the freight warehouse, was a part of the interstate commerce transportation, and was done before the law of Iowa could constitutionally attach to the goods, the conviction was erroneous, and the judgment below is, therefore, Reversed."

In the case of McNeill vs. Southern Railway Company, 202 U. S. 543, Mr. Justice White writing the opinion, held that the State Commission of North Carolina had no jurisdiction over a shipment of coal from the States of Pennsylvania, West Virginia and Tennessee, since the statute of the State of North Carolina and the order and decision of the Commission were void because in conflict with the commerce clause of the Constitution and the Act of Congress regulating commerce. At page 559 Mr. Justice White said: "The cars of coal not having been delivered to the consignee, but remaining on the tracks of the railway company in the condition in which they had been originally brought into North Carolina from points outside of that State, it follows that the interstate transportation of the property had not been completed when the corporation commission made the order complained of."

It will be seen from the reading of the opinions in the above cited cases that the deciding point as to interstate commerce was that the merchandise and the transportation thereof remained interstate in character until the delivery to the third person or consignee.

In the case of St. Louis, San Francisco & Texas vs. Seale, et al, 229 U. S. 156, 33 Supreme Court Reporter 651, the plaintiff's intestate was employed by defendant as a yard clerk in defendant's yard and, pursuant to one of his duties, at the time of his injury was on his way to defendant's yard to one of the tracks therein to meet an incoming freight train from another state. The purpose for which he was going to the train was to take the numbers of the cars and otherwise perform his duties in respect to them. While so engaged he was struck by a switch engine. This Court, by Mr. Justice VanDevanter, at page 161, says:

"In our opinion the evidence does not admit of any other view than that the case made by it was within the Federal Statute. The train from Oklahoma was not only an interstate train, but was engaged in the movement of interstate freight; and the duty which the deceased was performing was connected with that movement, not indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up *and the cars taken to the appropriate tracks for making up outgoing trains, or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line.*"

Habeas are ours

Again we see that this Court makes the point that the movement of the freight cars to the tracks for unloading or delivering freight which had been brought from without the state was interstate in character.

The shipment in fact had its destination at the track or place where the consignee or third party was to receive the freight.

A very different situation arises when the transportation from one state to another deals entirely with property belonging to the common carrier; more especially when this property is carried in the common carrier's own cars, over its own road, by its own employees and stored in its own yard for a period covering from two and a half to three and a half weeks. If this transportation of defendant's own supplies was an act of interstate commerce on the part of the defendant, the interstate feature of the act ceased when the cars were placed upon defendant's siding.

The New York Courts argue that the destination of the coal cars was the coal pockets. The only basis for such argument is the fact that the coal finally reached the coal pockets. The cars in question were billed to Cortland. Cortland was their destination, and there they had arrived. The duties of the train crew that brought the coal cars from Pennsylvania had ended. Before the cars could be moved to the coal pockets another set of employees must be called into motion—the switch engine crew. The work of this crew had no connection whatever with that of the employees operating the train that had brought the cars to Cortland. The functions of the two sets of employees were entirely separate and distinct. Delivery had taken place when the coal cars had been shifted to the siding. Taking these cars to the coal pockets was simply an act on the part of the Railroad in furtherance of its own convenience. Fully sixty per cent of the engines working out of the Cortland yards were coaled directly from the cars themselves.

The coal was left on the defendant's siding in the Cortland yards for future disposition as the Railroad

Company's convenience and necessity might require. It was supply coal. It might have been needed at the roundhouse. It might have been taken for use in defendant's heating plant. Its particular use depended entirely upon circumstances, and the needs of the defendant as the occasion demanded. As a matter of fact after the coal cars had stood from two and a half to three and a half weeks upon the storage track or siding, it was determined that the coal should be used for engines and should, therefore, be removed from the storage track to the coal pockets. That act, however, was remote from the interstate movement and entirely independent of it.

In the Harrington case, supra, the railroad company claimed that there was no evidence in the case that the coal in the cars concerned in the switching movement came from a mine within the State of Kansas, and if said coal cars came from without the State of Kansas, then plaintiff below, Harrington, was engaged in interstate commerce when he and his switching crew were moving the coal cars from the storage track to the coal shed. But Mr. Justice Hughes dismissed the suggestion, because there was no third party to whom this coal was to be delivered, but on the other hand it belonged to the carrier and had been transported over the carrier's own tracks and by the carrier's own employees and had reached its destination. He said: *"With the movement of the coal to the storage tracks however, we are not concerned; that movement had long since ended, as it is admitted that the coal was owned by the company, and 'had been in storage in its storage tracks for a week or more prior to the time it was being switched into the coal chutes on the morning of the accident.'"*

As to the question of whether or not the plaintiff, Barlow, was engaged in interstate commerce at the

time of his injury because the cars placed upon the trestle contained coal which was to be used in intrastate and interstate engines, we would again point to Mr. Justice Hughes' opinion in the Harrington case above cited:

"With respect to the employment of the decedent at the time of the injury (Illinois C. R. Co. v. Behrens, 233 U. S. 473, 478, 58 L. ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914 C, 163), it is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed. That duty was solely in connection with the removal of the coal from the storage tracks to the coal shed, or chutes, and the only ground for invoking the Federal act is that the coal thus placed was to be used by locomotives in interstate hauls.

"As we have pointed out, the Federal act speaks of interstate commerce in a practical sense suited to the occasion, and 'the true test of employment in such commerce in the sense intended is, was the employees at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it ?' Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 558, 60 L. ed.—, 36 Sup. Ct. Rep. 188, and cases there cited. Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use. It has been held that an employee of the carrier, while he is mining coal in the carrier's colliery, intended to be used by its interstate locomotives, is not engaged in interstate commerce within the meaning of the Federal act (Delaware, L. & W. R. Co. v. Yurkonis, 238

U. S. 439, 60 L. ed.—, 36 Sup. Ct. Rep. 160), and there is no distinction in principle between the two cases. In Great Northern R. Co. v. Knapp, 240 U. S. 464, 60 L. ed.—, 36 Sup. Ct. Rep. 399, the question whether the employee was engaged in interstate commerce was not presented, as the application of the Federal Statute was conceded in the State Court."

In the argument and briefs submitted before this Court in the Harrington case, supra, the case at bar was discussed. Counsel for the defendant in error in the Harrington case pointed out the erroneous holding of the New York Courts in the Barlow case and discussed the same at some length at page 22 and following of his brief.

Again, the case at bar was called to this Court's attention in the brief of plaintiff in error in opposition to motion to dismiss the Writ of Error at pages 33 and in plaintiff in error's Petition for a rehearing at pages 18, 19 and 20, where the Barlow decision also was discussed and relied on as authority for his contention, which this Court evidently declined to follow.

In the Harrington case "the coal was owned by the Company and 'had been in its storage tracks for a week or more prior to the time it was being switched into the coal chutes on the morning of the accident.' " In the case at bar one of the coal cars had been placed on the siding in defendant's yard at Cortland July 3rd, 1912, and the other two cars had been placed on the siding in defendant's yard at Cortland July 10th, 1912, where they remained until the day of the accident, July 27th, 1912. Fols. 121-125 inclusive.

In the Harrington case the coal was to be used by both interstate and intrastate engines. So also in the case at bar. Fols. 122-125 inclusive.

In view of the decision in the Harrington case, supra, counsel do not believe it necessary in this brief to review at length other decisions handed down by this Court upon the questions involved. Those decisions were cited in the briefs of the respective counsel and must have been carefully considered by the Court while deliberating in the Harrington case. Surely the law is now settled as far as cases involving the same state of facts are concerned. The case at bar is directly on all fours with the Harrington case in the essentials.

We would, however, respectfully invite the Court's attention to an additional feature in the case at bar, which it seems to us, quite regardless of decisions heretofore made, eliminates any question as to the application of the Federal Employers' Liability Act. The engine was uncoupled from the cars and was backing off the trestle at the time of the accident. Fols. 16-20 inclusive, 49-80 inclusive, 95-110 inclusive.

The switch engine had performed its work in placing the cars upon the trestle. That act or movement had been completed. The engine was disconnected from the coal cars and was backing down from the trestle when the accident happened. What work it was to engage in next does not appear. *Could it be said that the engine was performing an act connected with interstate commerce while running back off the trestle?* Or does that act continue till the switch engine reaches the bottom of the trestle—or the roundhouse—or concededly intrastate cars to be shifted in the yards? Where does the act end? If this switch engine is not engaged in interstate commerce all of the time, then we must draw the line somewhere. Since it had been disconnected from the cars which had held coal to be used in intra and interstate locomotives, and had no further function in connection with the placing of

the coal cars, and was on its way back from the trestle, we assert that it was not an instrument of interstate commerce *at the time of the accident.* In other words, the act which plaintiff was performing and the movement of the engine at the time of the accident had absolutely no bearing *in the furtherance* of interstate commerce.

There must be a dividing line somewhere between the interstate and intrastate work of the switch engine. We believe that the moment the cars of coal were placed upon the trestle and the engine detached, all that the switch engine could do in the furtherance of interstate commerce as to that particular act had been done. The immediate duty had been performed. The next thing to do with the coal in furtherance of interstate commerce, under the reasoning of the Court below, would be the opening of the floor of the car preparatory to dumping the coal into the pocket. It must be conceded that an employee can one minute be engaged in interstate commerce and the next minute be engaged in intrastate commerce.

At this point we would again quote from the opinion of Mr. Justice Hughes in the Harrington case, supra: "It is not important whether he had previously been engaged in interstate commerce or that it was contemplated that he would be so engaged after his immediate duty had been performed. There was no evidence as to what the engine was to do next; the evidence being that it was to 'do some other work.' " Fol. 93.

It is, therefore, respectfully submitted that the Trial Court and the Appellate Courts below erred in holding that the Federal Employers' Liability Act

was applicable to the case at bar. The Judgment appealed from should be reversed and the case sent back for trial under the rules and law as the same exist in the State of New York.

Respectfully submitted,

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JAN 8 1917
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BRIEF OF DEFENDANT IN ERROR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 194

LEHIGH VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR

vs.

JAMES H. BARLOW

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

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(24,843)

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT

The Defendant in Error was the plaintiff in the Court below, and is hereinafter referred to as the plaintiff; while the Plaintiff in Error is hereinafter referred to as the defendant.

It was the contention of plaintiff in the State Courts that this case came within the Federal Employers' Liability Act for two reasons:—First, that the transportation of the railroad company's supply coal from Pennsylvania, in which transportation plaintiff and

defendant were engaged at the time of the injury, was interstate commerce; second, that the placing of the three cars of supply coal in storage to be used indiscriminately in the coaling of interstate and intrastate engines was an act of interstate commerce.

Under the decision in this Court in the case of Chicago, Burlington & Quincy Railroad Company vs. Margaret Harrington, 241 U. S. 177, the second contention of the plaintiff is not tenable.

Counsel for the Railroad Company, in a labored effort to bring the facts on the other branch of this case within the Harrington case, now come forward with the contention that this supply coal, which was being placed upon the trestle over the coal pockets by plaintiff at the time of his injury, had been "in storage," and that the interstate transportation had thus been terminated at some time prior to plaintiff's injury. **The entire argument of counsel for the Railroad Company on this branch of the case is founded upon incorrect statements of fact.** In speaking of these cars counsel say at page 2 of their brief that they "had been **stored** in the defendant railroad's yard at Cortland, New York, until placed upon the coal trestle on the day of the accident." Also, on the same page, that the switching crew had taken the aforementioned cars of supply coal "from the **storage track** in defendant's yard at Cortland," etc. On page 8 counsel say that this coal had been standing "on the **storage tracks** from two and a half to three and a half weeks prior to the happening of the accident." Also on the same page they say that the movement ceased when the cars were placed upon

the "storage track" and the engine uncoupled. Similar expressions are used in other parts of their brief. **As a matter of fact there is not a particle of evidence nor is there even a statement or suggestion by counsel nor any one else anywhere in the record that the coal in question had ever been in storage or on storage tracks prior to the time that plaintiff sustained his injuries. In fact, the evidence of defendant's train master and master mechanic showed, (Fol. 34), and it was undisputed in the evidence, that there was only one coal pocket or place in Cortland where the defendant kept a supply of coal, and that this was the very place where the coal in question was being left at the time of plaintiff's injury, as will be clearly pointed out hereinafter. Obviously, counsel for the plaintiff have ingeniously adopted the language of the opinion in the Harrington case rather than the evidence in the case at Bar, as a basis of their statement of facts**

At page 5 of defendant's brief counsel say that the position of the defendant "upon the trial" was that the act of transporting cars of coal from Sayre, Pennsylvania, to Cortland, New York, had ceased when the cars had been placed on the sidings in the Cortland yards. **The defendant did not take any such position upon the trial, as the records show. This statement on the part of the counsel is absolutely without foundation.** If it had taken this position upon the trial and insisted that the question of whether or not the transportation from Sayre, Pennsylvania, had terminated prior to the time of plaintiff's injury, was a question for the jury, its position would be different on this appeal. The Court will observe that on the motion for a nosuit and dismissal (Fols. 81-85) no

such question was raised; nor when the motion was renewed at the close of the evidence (Fols. 111 and 112). Nor did counsel ask to go to the jury on the question as to whether or not the journey terminated at some time prior thereto, or on the trestle where the coal was dumped into the only place of storage in Cortland (Fol. 118 & 119).

At pages 12 and 13 of defendant's brief counsel say, "The coal was left on the defendant's siding in the Cortland yards for future disposition as the Railroad Company's convenience and necessity might require. It was supply coal. It might have been needed at the roundhouse. It might have been taken for use in defendant's heating plant. Its particular use depended entirely upon circumstances, and the needs of the defendant as the occasion demanded. As a matter of fact after the coal cars had stood from two and a half to three and a half weeks upon the storage track or siding, it was determined that the coal should be used for engines and should, therefore, be removed from the storage track to the coal pockets." **The only statement of fact in the above paragraph which is borne out by the record, and which is not flatly contrsdicted by the record, is the single statement that "it was supply coal."** The undisputed evidence is that there was only one place where the defendant kept a supply of coal and coaled engines in the City of Cortland, and that this was at the coal pocket in question; that the open bottom cars, called "self unloading" were placed upon the trestle over the coal pocket in question, where the coal was dumped into the pocket; and that the flat bottom cars were run along side of the pocket in question and that the

coal was taken out by means of a "clam shell." (Fols. 34 & 35). In other words, the destination of this supply coal in these "self unloading" cars was the coal pockets under the trestle in question. There was no other storage for supply coal in the yards at Cortland. The statement by counsel that this coal had stood from two and a half to three and a half weeks in storage subject to the determination of some employee of the railroad as to whether it should be used for engines, and as to whether it should be removed from storage to the coal pockets in question, is absolutely contrary to the record. This being the place where the "self unloading" cars were unloaded and being the only coal pocket or place where supply coal was kept in the City of Cortland, there was no occasion for anyone to "determine" where it should go or what should be done with it. If any coal was needed for the purpose of "defendant's heating plant," whatever that may be, (there being no evidence in the case that it had any "heating plant"), it is fair to assume that it would be taken from this coal pocket where the company kept its supply of coal.

The cars, in the switching of which plaintiff received his injury, had come from Sayre, Pennsylvania, to Cortland, New York, by defendant's road under way cards issued at Sayre, Pennsylvania, and in the process of this shipment of coal the cars in question were placed upon "switches and sidings" at Cortland New York, from which "switches and sidings" they were taken at the time of plaintiff's injury, and were placed upon the coal trestle. (See stipulation fols. 121 & 122, see also evidence Dane, Cole and Barlow, Fols. 16, 17, 23, 49—80). The conductor of the train

testified at folio 20 "after they had gotten up the incline there on the level place, these cars rested until they were afterward unloaded."

There is no evidence as to how long these cars had stood on "switches and sidings" at different points, during their transportation, excepting that it appears by the stipulation (Fol. 121 and 122) that one of these cars had stood upon the switches and sidings in the yard of the defendant at Cortland, New York, from July 3rd, and two of the cars had stood on switches and sidings in the yard at Cortland from July 10th to the time of the accident which occurred on the 22nd day of July, 1912.

Obviously they could not have been placed on the trestle by the same movement that brought them from Sayre to the Cortland yards. Some delay would necessarily intervene between the movement and the placing of cars upon the appropriate tracks for unloading and for delivery to consignees. During this period, they would necessarily stand on "switches and sidings." The stipulation shows how long these particular cars stood on "switches and sidings" before being placed on the track for unloading, and in fact contains the complete history, so far as this record is concerned, of these cars up to the time that they reached the trestle during the movement in placing them for unloading. No attention was given this at the time of the trial, as no one thought of raising the contention that this interstate shipment had been completed at any time prior to the placing of these cars on the trestle for unloading as aforesaid.

POINT I.

The Defendant waived the question as to whether or not the interstate transportation terminated prior to the time that this coal was placed on the trestle by not definitely and specifically raising the question on the motior for a nonsuit or to dismiss the complaint.

The practice in the State of New York requires the party to state definitely and specifically the grounds relied upon in a motion for a nonsuit or dismissal of the complaint at the close of the plaintiff's case or at the close of the evidence, or in any exception to a charge, or in a request to charge.

In Webb v. Odell, 49 N. Y. 583, the head notes says: "A motion to dismiss a complaint upon the ground that plaintiff has no cause of action should specify the defect, so that plaintiff may have an opportunity to supply it if in the evidence, or any move to amend the complaint. Where the defect is not specified and the motion is denied, an exception to the decision is not available, if any view of the evidence would sustain a cause of action, and not then unless it appears that the defect could not be supplied."

In Nilsson v. Haven, 47 A. D. 537 (Affd. 168 N. Y. 656) at page 541 of the opinion of Hatch, J. it is said: "The motion for a nonsuit was general and was based upon the ground that the contract was illegal; and themotion to dismiss was a renewal upon this ground and the further ground that the plaintiff had not proved a cause of action. * * * The exception which was taken is unavailing for the

review of such question. If the defendant desired a specific ruling thereon it was his duty to call the matter to the attention of the court; otherwise it may not be made available upon appeal."

See VanAernam v. Bleistein, 102 N. Y. 355.
Adams v. Greenwich Ins. Co. 70 N. Y. 166.
Mayheu v. Howard 2 State Reporter 155.

POINT II.

As Defendant was engaged and Plaintiff was employed in an act of interstate commerce at the time of the injury, and as the facts were alleged and proven at the trial, the case clearly comes within the Federal Employers' Liability Act.

The transportation of the cars and supply coal from Sayre, Pennsylvania, to Cortland, New York, was clearly an act of interstate commerce. (See North Carolina Railroad Company vs. Zachary, 232 U. S. 248 where it is held that the hauling of empty cars from one state to another is interstate commerce within the meaning of the act. Also see Chicago, Rock Island & Pacific Railway Company vs. Wright, et. al., 239 U. S. 548 where it was held that the taking of a road engine belonging to the company from one state to another was interstate commerce within the meaning of the act).

This brings us to the very narrow question of whether or not this transportation or shipment of coal was completed at any time before the cars and coal in question reached the trestle and coal pocket in Cort-

land where plaintiff sustained his injuries. If not, then clearly the judgment herein, should be affirmed. That the destination of this coal when it was shipped from Pennsylvania was the trestle upon which it was ultimately unloaded there can be no question. The undisputed evidence in the case is that the cars were "self unloading" and that these cars were placed upon the trestle and dumped into the pocket, whereas the flat bottom cars were unloaded outside of the coal pockets (Fol. 35); that there was only one coal pocket or place where the defendant kept a supply of coal for coaling engines in the City of Cortland, to-wit, the coal pocket near the north of the round house (Fols. 33 and 34); therefore the destination of the cars in question which began their journey at Sayre, Pennsylvania, was the trestle over the coal pockets where the coal was to be dumped into the only place of supply in Cortland. The purpose of the movement of the cars from the "switches and sidings" to the trestle was unquestionably a continuation of the purpose formed by the company in sending the cars from Sayre, to-wit, to deliver this supply coal in Cortland in the only place where it could be received, to-wit, this coal pocket.

The purpose of the operation involving the movement must determine whether the employee who was injured was engaged in interstate commerce at and preceding the time of the injury. (See Louisville & Nashville R. R. Co. v. Parker, 242 U. S. 13). It could not lose its character of interstate commerce by standing on switches and sidings, no matter at what point on the route these switches and sidings were located.

The Trial Court held, from the undisputed evidence,

(Fol. 82), "First, that the coal that was on these three coal cars came from Pennsylvania of (sic) these three cars; Second, that this coal belonged to the defendant and was being put upon their trestle and into these coal pockets for the use of the defendant in coaling or supplying its engines with coal." No exception was taken to that portion of the Court findings, nor did the counsel ask to go to the jury on the question of whether or not there was any interruption of the journey from Sayre to the coal trestle which made the movement of the cars intrastate instead of interstate commerce. The only question discussed was as to whether or not the transportation of coal for its own use was interstate commerce. In fact, this was looked upon and considered both by counsel and the Courts as an undisputed part of the continuous journey, the only question being whether or not the transportation of its own coal was interstate commerce, and whether or not coaling engines engaged in interstate commerce from the coal pockets in question made the act of the delivery of coal on the trestle an engagement in interstate commerce.

Mr. Justice Lyon in writing the opinion of the Appellate Division of the Supreme Court of the State of New York, in which the judgment herein was unanimously affirmed, says at folio 131 "Undoubtedly the ultimate destination of the three carloads of coal were the coal pockets which could only be reached by running the cars upon the trestle." Judge Miller, in writing the opinion of the Court of Appeals of the State of New York, in which the judgment herein was unanimously affirmed, says at Fol. 158,—"The transportation was not completed until the cars reached

their destination, the trestle where they were to be unloaded. The interstate transportation was interrupted, but not terminated, when the cars were put on the siding in the Cortland yards. **The case in that aspect is precisely the same as though that interruption had occurred at some other point in the route."** (The boldface is mine.)

The unanimous decision of the Courts of the State of New York holding that the transportation was not completed until the cars reached the trestle where they were to be unloaded is in accord with the cases decided in this court.

In McNeil v. Southern Railway Co. 202 U. S. 543 the railroad company tendered delivery of certain cars of coal on the "team track," then in about two weeks they were removed to a "distant siding." About two weeks after delivery had been tendered on the "team track" the corporation counsel of the state made an order requiring the delivery of these cars at the storage of the consignee on a private track. It was held that the transportation of this coal had not been completed, and that it was an unlawful interference with interstate commerce.

In St. Louis, San Francisco & Texas Railway Co. vs Seale, et al., 229 U. S. 156 where a yard clerk was injured while going to take the numbers of cars on an incoming freight, the Court says at page 161,—"The interstate transportation was not ended merely because still was necessary that the train be broken up and the cars were not going to points beyond. Whether they were going further or were to stop at that station, it

still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains or **for unloading or delivering freight,** and this was as much a part of the interstate transportation as was the movement across the state line." (Boldface is mine.)

Counsel for the railroad company attempted to distinguish between these cases and the one here at issue and says at page 12 "a very different situation arises when the transportation from one state to another deals entirely with prperty belonging to the common carrier," but cite no case which makes any such distinction. The Seale case says that it was necessary that the train be broken up and the cars taken to the appropriate tracks **"for unloading"** and that the taking of these cars to the tracks for unloading were as much a part of the interstate transaction as were the movement across the line. This is exactly our contention in the case here at issue.

VanEtten and Elmira, both in the State of New York, are the terminals of this division; and are as far as the engines from the Cortland yards haul trains. (Fols. 36 & 37). Suppose that while the coal in question was standing on the switches and sidings in VanEtten, Elmira or Cortland, prior to the time that this coal reached the trestle and coal pockets in question, the public service commission of the State of New York had attempted to interfere with its shipment?

Would there be any question about such an interference effecting interstate commerce?

In Great Northern Railway v. Otos, 239 U. S. 349,

the Court held that a crippled car being taken out for repairs was not withdrawn from interstate commerce, "but merely subjected to a delay in carrying it to its destination." (See also Johnson v. Southern Pacific Co. 196 U. S. I.)

The case of Chicago, Burlington & Quincy Railroad Company vs. Harrington, 241 U. S. 177, is in no way in conflict with the contention of the plaintiff and the decisions of the Courts of the State of New York that the transportation of the carloads of coal in question was not completed until they reached the trestle where the defendant in error sustained his injuries.

From the printed record in the Kansas City Court of Appeals in the Harrington case, which I assume was substantially the same in the United States Supreme Court, it appears from the examination of the engine foreman of the railroad, that the railroad company had three or four yards in Kansas City where cars were kept and distributed. That in one yard there was a track known as "track 12" a track they used for storing company coal, and upon which was usually stored the company coal, where it would stay until they used it up; and when they needed coal they would go to this storage track and get it. It was called a "storage track," or "hold track," and it was used for placing coal and company material to hold for disposition. There was no evidence that the coal came from without the state.

At page 5 of the brief of plaintiff in error in opposition to motion to dismiss writ, etc. counsel says,— "The evidence on behalf of plaintiff further shows conclusively that the coal which was being switched by

the deceased and other employees at the time of his death had previously been set apart by the railroad company as coal to be used upon its engines, and for some days had been in storage upon the company's storage tracks; that all of the switching engines of the defendant railroad company and all of its road engines were continuously engaged in interstate commerce, so that this coal had been set apart as an instrumentality of interstate commerce." Again on page 23 of the brief counsel says "The evidence adduced on behalf of the plaintiff below, fully disclosed the nature of the employment of the deceased at the time of the accident, that is, he was employed generally as a switchman, and was engaged in switching cars engaged in interstate commerce, and at the precise time of the injury was switching loaded cars of coal from the company's storage tracks to its coal chutes for the purpose of supplying engines engaged in interstate commerce with fuel."

In the Harrington case, the railroad company's counsel relied upon the fact that this switching engine and its crew were continuously engaged in switching interstate cars in the yards, and that at this particular time were moving cars of coal which was to be used in coaling interstate engines. There never was a claim, and there was no evidence given that the coal came from without the state, or that the cars moved to the chute had been engaged in a journey beginning without the state before going upon the storage track. As to these cars, the only element of interstate commerce was that they contained coal which was to be moved upon the chute for the purpose of coaling engines to be used in interstate commerce.

In the opinions written in the State Court by Johnson, J. and Trimball, J. this coal is spoken of as having been mined within the state, although I am unable to find anything in the record to indicate from whence it did come. (See report of this case in 180 Southwestern Reporter 443).

It is true that Mr. Justice Hughes says in the Harrington case, "With the movement of the coal to the storage tracks, however, we are not concerned; that movement had long since ended, as it is **admitted** that the coal was owned by the company and **'had been in storage in its storage tracks** for a week or more prior to the time it was being switched into the coal chutes on the morning of the accident.'" (Boldface is mine).

The position taken on this question by Mr. Justice Hughes was not essential to the decision of the case. **It was, moreover, a statement of facts admitted in the Harrington case which are not only sharply contradicted in the case here at issue, but which were not even contended for by the railroad company at the time of the trial. The admitted statement of facts in the Harrington case is not only directly contrary to the facts proven in the case here at Bar, but is directly contrary to the findings of all of the New York state Courts.**

The coal cars being placed upon the trestle by the defendant in error had not been "in storage in its storage tracks." There is no evidence and no contention that the plaintiff in error had any storage or had any storage tracks anywhere on its route between the point

where this coal was shipped in Pennsylvania and the trestle where these cars were placed. The evidence of Mr. Paige, their train master and master mechanic, is that the trestle and pocket in question was the only place where they kept a supply of coal and coaled engines in the City of Cortland. (Fol. 34). The stipulation in the case here at issue expressly states that the cars here in question were placed upon "switches and sidings" (Fol. 121).

If the placing of cars on switches and sidings during the transportation for a period of two or three weeks terminates the transportation, then the placing of cars on switches and sidings for three or four days or two or three hours would have the same effect. Suppose that the cars in question had stood on the switches and sidings in either VanEtten, or Elmira, the terminals of this division (Fol. 36), or in Cortland, for a day or even for an hour or half an hour before their journey was continued to the coal trestle? Would this have constituted a termination of the interstate commerce at the time that these cars were placed upon these switches and sidings? If not, then the fact that they remained upon these switches and sidings for several days would not invoke any different principle. To lay down the doctrine that the placing of cars on switches and sidings during the course of their transportation terminates the original transportation and starts a new one, would not only involve the Court in endless questions and difficulties, but would be contrary to the uniform decisions of this Court on this question.

Pages 16 and 17 of the defendant's brief is devoted to the contention that the movement of the placing of

these coal cars had ceased at the time that plaintiff was injured. **Again the argument of the counsel for the railroad company is based upon an incorrect statement of the facts as they appear in the record.** At page 16 of their brief counsel for the railroad company say,—"The engine was disconnected from the coal cars and was backing down from the trestle when the accident happened."

The injury to the plaintiff occurred in the uncoupling of the engine from the coal cars in question. The plaintiff had gone in under the engine to examine a brake rigger that was down so that the engine could be uncoupled from the cars in question and run down off the trestle. The conductor proceeded to uncouple irrespective of the condition of the brake rigger, and it was during this movement of uncoupling that the injury was sustained. The conductor says at Folio 20,—**"The slacking and reversing were part of one transaction; trying to get the cars cut off; I couldn't get them cut off the first time; he had to give me slack in order to get a better pull; it was slack ahead and back all part of one movement."** (Boldface is mine). This was the movement in which plaintiff sustained his injury. (Fol. 23). This clearly was a part of the transaction of placing these cars. (See New York Central & Hudson River Railroad Co. vs. Carr, 238 U. S. 260, Great Northern Railway Co. vs. Otos, 239 U. S. 349).

In discussing this question Judge Miller, who wrote the opinion in the Court of Appeals in the State of New York, said,—"I shall assume, **although the evidence would justify a different finding,** that the act of un-

coupling the cars from the engine had been completed and that the fireman had started to back the engine down the incline from the trestle when the accident occurred. Still the particular service in interstate commerce was not completed. The rule governing the case could not be changed by the mental determination of someone in authority to put the crew at intrastate work upon the return of the engine to the yard. The case in that aspect is the converse of the Berhrens case." (Boldface is mine). (Fol. 159). The most favorable attitude of this Court which could be taken towards the defendant would be to find that there was a question of fact as to whether the plaintiff was injured while the coal cars in question were being uncoupled from the engine, or whether that act had been completed, and it was while the fireman was backing the engine down the incline from the trestle.

The position of the defendant is no better on the other branch of the case. The most that could possibly be said in behalf of the railroad would be that there was a question of fact as to whether or not the transportation of the coal in question from Sayre, Pennsylvania to the coal trestle in question had terminated at some time when this coal had reached the switches and sidings either in Elmira or VanEtten or in Cortland, although no one, as the Court can see from the record, had any such motion as this in mind at the time of the trial. If the railroad company had requested the submission to the jury of the question as to whether or not the destination of this coal was the trestle in question or some switch or siding before it reached the coal trestle, and also the question as to whether or not the act of placing this coal had been completed at the

time of plaintiff's injury, and had asked that the decision of these questions of fact be made the sole test of whether or not the plaintiff and the defendant were engaged in interstate commerce, and had taken the proper exceptions to the refusal to submit these questions, it would now be in a position, if the Court agrees with it in its contentions, to raise these questions. No such questions as these having been raised upon the trial, the determination by this Court that the evidence on the trial was sufficient to raise questions of fact on these subjects, which should have been submitted to the jury, is not sufficient ground for reversing the judgment. See Louisville & Nashville R. R. Co. v. Parker, 242 U. S. 13.

In other words, at the time of the trial no one thought of there being any such questions in the case as the questions now attempted to be raised by the attorneys for the railroad company. The attorneys for the company then relied entirely upon the legal propositions that the placing of coal on the trestle which was being used indiscriminately in coaling interstate and intrastate engines was not an act of interstate commerce, and that the transportation of the company's own coal in its own cars from the state of Pennsylvania into the State of New York, was not an act of interstate commerce and did not come within the Federal Employers' Liability Act. On the first proposition they were right. On the second proposition they were wrong. They now seek to escape the consequences by attempting to show the Court that there was, or might have been, questions of fact in reference to the two movements or operations above stated. The plaintiff does not concede this, but even

so, under the above decision it affords them no relief.

There is no question of law involved in this case. The questions are purely questions of fact, and **all of the Courts of the State of New York have passed upon these unanimously adversely to the railroad company.** The plaintiff was sixty years old at the time he sustained this injury (Fol. 32). The action was at issue in 1912 (Fol. 15). Judgment was entered in April, 1913 (Fol. 127). For between four and five years this old man, who lost a leg in this accident, has been waiting for the disposition of this case by the state and federal courts. All questions of law and principles involved in his case have been heretofore passed upon and settled in this Court. With a man of his age, in view of the necessary delays in procedure in this country, the result of a reversal would probably be that this old man would never receive anything during his life time in compensation for his injuries, which a jury has found were caused by the negligence of this defendant.

The ends of justice requires that there should be no reversal unless it be entirely clear that the federal statute in question furnished no remedy.

POINT III.

The judgment should be affirmed with costs.

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